FILED

03 575 OCT 15 2003

No. _____

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In The

Supreme Court of the United States

FRANK M. PATTI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the United States Court of Appeals for the Eleventh Circuit held, a defendant who enters a guilty plea waives the right to seek appellate review of a district judge's denial of a disqualification motion filed pursuant to 28 U.S.C. § 455(a), following the Fifth and Tenth, as well as the Seventh, Circuits, or whether there is no such waiver of appellate review, as the First and Second Circuits have held.

2. Whether the Eleventh Circuit may ignore *Williams v. United States*, 503 U.S. 193 (1992), in which this Court held that 18 U.S.C. § 3742(f) requires a remand for resentencing whenever the government cannot satisfy the burden of demonstrating that an error in the district court's decision to impose an upward departure above the Sentencing Guidelines did not affect the sentence ultimately imposed, where no more than two of three reasons given by the district court for an upward sentencing adjustment under the Sentencing Guidelines withstand appellate scrutiny.

PARTIES TO THE PROCEEDINGS

Petitioner is Frank M. Patti, Sr. ("Patti" or "Petitioner"). Respondent is the United States of America. There were no other parties below.

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PETITION FOR WRIT OF CERTIORARI

Frank M. Patti, Sr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-16a) is reported at 337 F.3d 1317. The order of the district court denying petitioner's motion for disqualification (App., *infra*, 17a-28a) is unreported. The supplemental order of the district court denying petitioner's motion for disqualification (App., *infra*, 29a-31a) is unreported. The bench opinion of the district court pronouncing sentence upon petitioner (App., *infra*, 32a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES, AND SENTENCING GUIDELINES INVOLVED

Section 455(a) of Title 28, United States Code, entitled "Disqualification of justice, judge, or magistrate judge," provides, in relevant part, as follows:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any

> proceeding in which his impartiality might reasonably be questioned.
>
> . . .
>
> (e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(a), (e).

Rule 11 of the Federal Rules of Criminal Procedure, entitled "Pleas," provides, in relevant part, that "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." Fed. R. Crim. P. 11(a)(2).

Section 3C1.1 of the United States Sentencing Guidelines, entitled "Obstructing or Impeding the Administration of Justice," provides as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1 (1997).

Section 3742 of Title 18, United States Code, entitled "Review of a sentence," provides, in relevant part, as follows:

> **(f) Decision and disposition.** – If the court of appeals determines that the sentence –
>
> > (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate. . . .

18 U.S.C. § 3742(f)(1).

STATEMENT

Petitioner Patti, now nearly 74 years old, was indicted by a federal grand jury charging him with various tax and tax conspiracy offenses. Patti unsuccessfully sought to have the district judge disqualified pursuant to 28 U.S.C. § 455(a) on two occasions. On April 12, 2002, Patti entered a plea of guilty, which was accepted by the district court, and was thereafter sentenced to a term of imprisonment of 79 months.

The Eleventh Circuit ruled that by pleading guilty, Patti waived his right to appeal the district court's denial of his disqualification motion and otherwise affirmed Patti's sentence in its entirety. App., *infra*, 3a-16a. As to waiver, the Eleventh Circuit acknowledged that on this issue there is a significant split of the circuits:

> Our sister circuits that have considered that issue, however, have come to opposite conclusions, thus creating a circuit split.

Id. at 4a. The First and Second Circuits hold that an unconditional guilty plea does not waive the right to appellate review; the Fifth and Tenth, as well as the Seventh, Circuits have adopted the opposite view.

1. On May 31, 2000, a grand jury empanelled in the Pensacola Division of the Northern District of Florida returned a sealed eight-count indictment charging Patti with tax offenses. The case was assigned to United States District Judge Lacey A. Collier of that district. On February 21, 2001, the grand jury returned a twelve-count superseding indictment charging Patti with additional tax offenses.

2. Shortly after the superseding indictment was unsealed, Patti filed a motion to disqualify Judge Collier pursuant to 28 U.S.C. § 455(a) which was supported by affidavits executed by both Patti and his then-fiancée, Alice Guy. *See* Motion to Disqualify Judge Lacey Collier and Incorporated Memorandum of Law (filed Mar. 9, 2001). In that motion, Patti alleged a number of grounds for disqualification.[1] Judge Collier denied Patti's motion on

[1] The grounds for disqualification initially included the fact that Patti had been approached by an individual on or about February 15, 2001, who stated that he was a close friend of Judge Collier and P. Michael Patterson, the United States Attorney for the Northern District of Florida. The individual suggested that if Patti donated $500,000 to a specified charity supported by Judge Collier, the government's case against Patti could "come to an end." Patti also noted that local newspapers were reporting that Judge Collier was supporting Patterson's reappointment as United States Attorney.

March 13, 2001, rejecting both affidavits as not credible. App., *infra*, 17a-28a.

3. On May 18, 2001, Patti's counsel supplemented the record by filing a handwritten letter dated May 5, 2001, from Micki Conti (an individual who provided care to Judge Collier's mother) addressed to the Honorable Roger Vinson, Chief Judge of the Northern District of Florida. In that letter, Conti wrote:

> [Judge Collier told me] in January [2001] that the Patti case would be heard in Tallahassee[2], that Frank Patti [sic] could not get a fair trial in Pensacola, also Frank had a million dollar check hidden in a drawer, and Frank had been investigated for years, and stated Frank had deducted $2000 [sic] month on his properties and didn't report it to I.R.S., and other things that concern me.

See Supplement to Record of Defendant's Prior Motion to Disqualify Judge Lacey Collier (filed May 18, 2001). Despite his own alleged public expression of opinion regarding legal and factual aspects of the case, Judge Collier issued a supplemental order denying Patti's motion to disqualify. App., *infra*, 29a-31a. In that order, Judge Collier confirmed that he had discussed this case "in a loud conversational tone" in the presence of Conti, his mother, and "forty plus residents and guests, the meal providers, and the care givers":

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[2] Judge Collier, in fact, issued that ruling *sua sponte* not long thereafter, in March 2001, finding that Patti's "media campaign" required transfer of trial from the Pensacola Division to the Tallahassee Division of the Northern District of Florida.

> These intimate "family" conversations with the judge's ninety-five year old mother which included Ms. Conti – a long time and trusted friend who had for many, many years provided love and care to this elderly lady – and consisted of explanation and discussion of the publicity surrounding the Patti case simply can not be considered as a violation of any rule of appropriate conduct. The conversations took place in the public dining hall at the care-giving facility in the presence of forty plus residents and guests, the meal providers, and the care givers. All were conducted in a loud conversational tone to accommodate the judge's mother's severe hearing impairment.

Id. at 29a-30a. Judge Collier rejected the suggestion that such conversations created an appearance of partiality and, as he did with the allegations in the earlier disqualification motion, disputed the timing, stating:

> All alleged comments – some made in response to Ms. Conti's questions – concerned allegations appearing in the news media and the public record of the case that were made well known to the public through the preceding year-long media blitz. No reasonable person can believe that a ninety-five year old mother would have cause to inquire about a case until her son was connected with it, which, of course, had to be after the announcement of the judge assignment in February, not January.

Id. at 30a.[3] Significantly, Judge Collier's order used language that further evidenced what an outsider would view as partiality:

> The justice system cannot permit an admitted partisan sympathizer to write an unchallenged letter and allow it to effect [sic] proceedings in a criminal matter. . . . The shameful betrayal of confidence, love, and privacy can not be rewarded. This effort must be, and is, rejected.

Id. at 30a-31a.

4. On December 19, 2001, a grand jury returned a twenty-four count second superseding indictment adding Ms. Guy as a co-defendant. Patti was charged with additional tax and tax conspiracy offenses.

5. Patti thereafter retained new counsel and incorporated and reasserted all his motions filed in connection with the superseding indictment, including his motion to disqualify the district court and the supplement to the record of that motion. *See* Defendant Frank M. Patti's Motion to Incorporate and Reassert All Prior Motions (filed Mar. 7, 2002).

6. On April 11, 2002, Patti agreed to plead guilty to Counts Eight and Thirteen of the second superseding indictment. Count Eight alleged that Patti filed a false 1996 individual income tax return in violation of 26 U.S.C. § 7206(1). Count Thirteen alleged that Patti conspired to

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[3] Patti notes that there was significant evidence below to dispute Judge Collier's findings. *See* Government's Motion for An Order Protecting the Integrity of the Jury Selection Process at 12-15 (filed Feb. 22, 2001).

defraud the United States with regard to the collection and payment of certain employment taxes in violation of 18 U.S.C. § 371. The agreement contained no terms with respect to any Sentencing Guidelines factor. On April 12, 2002, the district court accepted Patti's guilty plea after a hearing and scheduled sentencing for June 25, 2002.

7. On May 22, 2002, the Probation Office disclosed its Presentence Report ("PSR"). The PSR contended that Patti obstructed justice on a number of grounds, including (1) his "media campaign" which "tainted the jury pool" and caused the trial to be moved to Tallahassee; (2) his alleged involvement in a failed arson attempt at the office of his then-accountant; and (3) his feigning of amnesia in an effort to avoid trial.

8. On July 2, 2002, following a lengthy sentencing hearing, the district court rendered a bench ruling, finding that the tax loss was $4,791,267.18 (corresponding to a base offense level of 21), that Patti had engaged in the three separate acts of obstruction of justice detailed above (two levels), employed sophisticated concealment (two levels), and was an organizer or leader (four levels). App., *infra*, 32a-45a. The district court found that Patti had not accepted responsibility for his actions despite: (1) his guilty plea; (2) his cooperation with law enforcement authorities with respect to an attempted juror tampering scheme involving his own case; and (3) his payment of close to $4 million to the Internal Revenue Service prior to sentencing. *Id.* at 43a-44a. In addition, the district court held that Patti was not entitled to a downward departure in light of his "multiple obstructive acts." *Id.* at 44a. The district court did conclude, however, that a downward departure of two levels was warranted due to the grouping of Counts Eight and Thirteen. *Id.* at 45a. Thus, the district court

found the total offense level to be 27, which resulted in a guideline range of 70 to 87 months. *Id.* The district court sentenced Patti to a term of imprisonment of 79 months (36 months as to Count Eight and 43 months as to Count Thirteen, with such terms to run consecutively) with no other statement about why the particular sentence within the guidelines range was imposed. *Id.* at 49a.

9. Patti surrendered to the custody of the Federal Bureau of Prisons on August 12, 2002, and is incarcerated at the Federal Medical Center in Fort Worth, Texas.

10. On July 18, 2003, the Eleventh Circuit issued its opinion. App., *infra*, 1a-16a. With regard to the district court's denial of Patti's disqualification motions, the court of appeals found that Patti waived the right to appeal that issue by pleading guilty. *Id.* at 3a-9a. Acknowledging that "[o]*ur sister circuits that have considered that issue, however, have come to opposite conclusions, thus creating a circuit split*," *id.* at 4a (emphasis added), the court of appeals concluded that the "'denial of recusal is a pretrial defect which is sublimated within a guilty plea and thereafter unavailable as an issue for appeal.'" *Id.* at 8a (*quoting United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988)). With respect to sentencing, the court of appeals affirmed in all respects, finding that the district court properly sentenced Patti, including its enhancement based on an obstruction of justice. App., *infra*, 9a-16a.

REASONS FOR GRANTING THE PETITION

A. This Court Should Grant Certiorari To Resolve An Important and Recurring Issue of Federal Criminal Law Upon Which the Circuits Are Sharply Divided

As this Court has long recognized, "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *accord United States v. Ruiz*, 536 U.S. 622, 632 (2002) (noting the government's "heavy reliance upon plea bargaining in a vast number – 90% or more – of federal criminal cases"); *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice.").

In 2001, the most recent year for which statistics are currently available, the United States Sentencing Commission reported that 96.6 percent of all offenders pleaded guilty. *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2001), Table 10. Trial rates have declined from 6.8 percent of all cases in 1997 to 3.4 percent of the cases reported in 2001. *Id.* at Figure C. Ignoring that staggering reality, the court of appeals concluded that the "denial of recusal is a pretrial defect which is sublimated within a guilty plea and thereafter unavailable as an issue for appeal." App., *infra*, 8a (*quoting United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988)). In doing so, the court of appeals determined that finality in criminal cases is more important than public confidence in the appearance of impartiality of the judicial process.

In an era when the discretion of the judiciary in sentencing is being cabined in by acts of Congress, *see* PROTECT Act, Pub. L. 108-21, Tit. IV, § 401, 117 Stat. 650 (Apr. 30, 2003), it becomes of critical importance to preserve the appearance of impartiality in the system. The holding of the court of appeals effectively renders disqualification challenges unreviewable in criminal cases where the defendant enters a guilty plea. This case places in stark focus the issue of whether the appearance of impartiality should trump finality in a criminal justice system where the vast majority of offenders plead guilty rather than proceed to trial. A substantial circuit conflict exists on this important question of federal criminal law.

1. The Eleventh Circuit specifically acknowledged that a circuit split exists with regard to the question of whether a defendant's unconditional guilty plea waives the right to challenge on appeal a district court's denial of a disqualification motion, acknowledging that "[o]ur sister circuits that have considered that issue, however, have come to opposite conclusions, thus creating a circuit split." App., *infra*, 4a.

The First and Second Circuits have concluded that a defendant may challenge on appeal the district court's denial of a recusal motion even after entering an unconditional guilty plea. *See United States v. Brinkworth*, 68 F.3d 633, 637-38 (2d Cir. 1995); *United States v. Chantal*, 902 F.2d 1018, 1020-21 (1st Cir. 1990).

In sharp contrast, the Fifth and Tenth Circuits have held that a defendant waives the right to challenge such a denial. *See United States v. Hoctel*, 154 F.3d 506, 507-08 (5th Cir. 1998); *United States v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.), *cert. denied*, 486 U.S. 1044 (1988); *see*

also United States v. Troxell, 887 F.2d 830, 833 (7th Cir. 1989) (holding that the defendant waived her right to appeal the denial of her 28 U.S.C. § 455(a) motion because the "denial of a motion for recusal based on the appearance of impropriety can be challenged only with a writ of mandamus"). There is thus a mature circuit conflict now involving six circuit courts on this important question of federal criminal law.[4] Review by this Court is therefore warranted "[b]ecause uniformity among federal courts is important on questions of this order." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

2. The reasoning of the First and Second Circuits, holding that there is no waiver of the right to seek appellate review of the denial of a disqualification motion, is correct and clearly more persuasive than that of the Fifth and Tenth Circuits, as well as that of the Seventh Circuit.

a. The Second Circuit held that a district court's wrongful denial of a 28 U.S.C. § 455(a) motion is "an error that affects the integrity of the whole judicial process," *United States v. Brinkworth*, 68 F.3d at 638, not simply an error that affects an individual defendant's rights. The *Brinkworth* court further noted that "[s]ection 455(a), therefore, is as much a protection for the citizenry as for the complaining defendant." *Id.* at 637; *see also United*

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[4] A commentator has also noted the sharpness of this circuit conflict even prior to the decision of the court of appeals at issue here. *See* Nancy B. Pridgen, "Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant to Appeal the Denial of a Recusal Motion Even After Entering An Unconditional Guilty Plea," 53 Vand. L. Rev. 983, 985-86 (Apr. 2000).

States v. Columbia Broadcasting System, Inc., 497 F.2d 107, 109 (5th Cir. 1974).

The Second Circuit also rejected the argument that a defendant may waive recusal under 28 U.S.C. § 455(e) as "formalistic," *United States v. Brinkworth*, 68 F.3d at 638, and this argument is flatly inconsistent with the legislative history of the statute. *See* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6357 ("the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver").

b. The First Circuit held that "the idea that a plea of guilty would wipe out the attainment of adjudication by [an impartial] court is simply contrary to fundamental fairness, and the constitutional demand that judicial proceedings be conducted by a 'neutral and detached judge.'" *United States v. Chantal*, 902 F.2d at 1021 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)).

3. The Eleventh Circuit's decision in this case, relying on the opinions of the Fifth and Tenth Circuits and also the Seventh Circuit, was wrong.

a. In holding that a guilty plea waives the right to challenge the denial of a disqualification motion on appeal, the Eleventh Circuit improperly concluded that finality in criminal cases is more important than public confidence in the appearance of impartiality of the judiciary. In enacting § 455(a), Congress intended to ensure not only an impartial district court but also the appearance of one. *United States v. Chantal*, 902 F.2d at 1021. Indeed, that section "is designed to promote public confidence in the impartiality of the judicial process." H.R. Rep. No. 93-1453, 93d

Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. This legislative history indicates that "the integrity of the judiciary is the paramount concern of the statute" and, therefore, section 455(a) is "as much a protection for the citizenry as for the complaining defendant." *United States v. Brinkworth*, 68 F.3d at 637. The Eleventh Circuit's resolution of the statutory construction issue cannot be squared with the legislation or its legislative history.

b. The Eleventh Circuit also improperly premised its decision on an erroneous interpretation of the disqualification statute's waiver provision, which provides as follows:

> No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(e). The Eleventh Circuit held that a defendant may not waive the right to an impartial jurist but may waive the right to an appearance of impartiality. App., *infra*, 8a n.7. The "full disclosure" provision permitting waiver under § 455(e) was clearly intended to cover only those circumstances where the court itself, or the parties, disclosed and agreed to facts underlying a potential disqualification and, after full disclosure on the record, *jointly agreed* to permit the judge to continue to preside. *See, e.g., United States v. Rogers*, 119 F.3d 1377, 1382 (9th Cir. 1997) (noting that defendant "expressly approved of the district judge's continued service in this case. [His] election to proceed after this disclosure constitutes an effective waiver under § 455(e)"). The Eleventh Circuit

inexplicably found that a motion by a defendant, refuted by the government and the court, created a sufficient "full disclosure" on the record. App., *infra*, 7a n.6.

This holding is inconsistent with prior rulings of the Eleventh Circuit, where waiver pursuant to 28 U.S.C. § 455(e) had been strictly construed. *See United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989) (waiver should be "limited to marginal cases and should be exercised with the utmost restraint"); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1114 (5th Cir. 1980) ("Congress believed that public confidence in the impartiality of federal judges would be enhanced by a stricter treatment of waiver.").[5] Even if a defendant may waive his right to have a district court disqualify itself, an unconditional plea alone cannot serve to waive the right to appeal a disqualification order under 28 U.S.C. § 455(a).

c. The conflicting approach of *United States v. Hoctel*, 154 F.3d 506, 507-08 (5th Cir. 1998), and *United States v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.), *cert. denied*, 486 U.S. 1044 (1988), is based upon a view of waiver inconsistent with Congress' stringent interpretation of 28 U.S.C. § 455(e). *See* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6357 ("the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver").[6] Moreover,

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[5] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[6] The plea agreement in *Hoctel* contained an explicit waiver of the right to appeal the sentence under the Sentencing Guidelines. 154 F.3d at 507. No such provision is contained in Patti's guilty plea agreement.

in a post-*Gipson* decision, the Tenth Circuit permitted review of a disqualification denial where the defendant entered into a plea agreement that was conditioned upon other issues. *See United States v. Greenspan*, 26 F.3d 1001, 1005-07 (10th Cir. 1994).

The Seventh Circuit's view, outlined in *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989), may be based on that circuit's position that a denial of a motion for recusal based on § 455(a) can only be challenged by a writ of mandamus, *see United States v. Horton*, 98 F.3d 313, 316 (7th Cir. 1996); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1255 (7th Cir. 1993), whereas in virtually every other circuit, including the Eleventh Circuit, such a denial is reviewable on appeal following final judgment. *See, e.g., Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 384-85 & n.5 (11th Cir. 1991). In any event, four circuits have found that waiver occurs while, as noted, the First and Second Circuits have squarely rejected that view.

d. The Eleventh Circuit concluded that "as we have held that other significant issues can be waived by entering an unconditional guilty plea, this decision is consistent with our precedent." App., *infra*, 8a n.7 (*citing United States v. Fairchild*, 803 F.2d 1121, 1124 (11th Cir. 1986)). Central to this issue is whether this Court's prior holding that an unconditional guilty plea waives all non-jurisdictional challenges, including constitutional claims, *see Tollett v. Henderson*, 411 U.S. 258, 267 (1973), controls in the circumstances of a challenge to the fairness of the judiciary. The guilty plea jurisprudence of this Court does not conflict with the enforcement of 28 U.S.C. § 455(a) because an unconditional guilty plea should not serve to

waive the right to an impartial jurist. *See Brady v. United States*, 397 U.S. 742, 750 (1972); *McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794-99 (1970). This case, however, does not involve a petitioner who sought to withdraw a guilty plea but instead a petitioner who conceded that he was guilty of the pleaded-to offenses and sought a sentencing before an impartial jurist. The Court's *Brady* trilogy does not support a finding that a plea waives the right to challenge a disqualification motion.

f. The Eleventh Circuit further premised its ruling on a finding that "Patti failed to avail himself of the options that were available for obtaining review of the denial of his motion for recusal." App., *infra*, 8a. These "options," according to the court of appeals, included an immediate petition for writ of mandamus or a conditional guilty plea. *Id.* On this record, neither of these options were either viable or necessary preconditions to the right to an impartial sentencing jurist.

Although the writ of mandamus may theoretically be available, it is plainly not required. The Eleventh Circuit has been extraordinarily reluctant to exercise its mandamus power and, instead, requires litigants to raise disqualification issues at the conclusion of the proceedings. *See In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 961-62 (5th Cir. 1980) (stating that party seeking mandamus must have no other method to seek relief and mandamus will not lie if review is available after final judgment). Indeed, the Eleventh Circuit has reviewed disqualification denials in criminal cases after entry of final judgment. *See United States v. Young*, 39 F.3d 1561, 1569-70 (11th Cir. 1994); *United States v. Chandler*, 996 F.2d 1073, 1103-04 (11th Cir. 1993), *cert. denied*, 512 U.S.

1227 (1994). Other circuits have espoused similar views. *See, e.g., United States v. Arena*, 180 F.3d 380, 398-99 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *United States v. Jordan*, 49 F.3d 152, 155-58 (5th Cir. 1995).

Similarly, the notion that Patti could have preserved the disqualification issue by entering into a conditional plea under Fed. R. Crim. P. 11(a)(2) (which requires the approval of the district court and the consent of the government) is wholly unrealistic. As trumpeted in its appellate brief, the government "refused to enter a plea agreement unless Patti pled 'straight up' to enough counts to enable the district court to impose a guideline sentence." Brief of Plaintiff-Appellee United States of America at 49 n.24 (filed Jan. 27, 2003). The First Circuit rejected this "conditioning" argument, stating:

> Congress established by the detailed provisions of § 455(a) an entirely new concept of acceptable judicial disqualification. It would be incongruous to hold that for one seeking the benefit of such protection the consent would have to be obtained from the very judge whose qualifications are under attack.

United States v. Chantal, 902 F.2d at 1021. Moreover, Patti did not seek to withdraw his guilty plea under Fed. R. Crim. P. 11(a)(2) but only a fair sentencing.

For this reason, the Court should issue a writ of certiorari to review the Eleventh Circuit's decision in this case.

B. The Eleventh Circuit's Ruling Upholding Petitioner's Sentence Based Upon Multiple Acts of Obstruction of Justice Ignored This Court's Precedent, Conflicts with the Rulings of Other Circuits, and Was Clearly Erroneous

The Eleventh Circuit upheld the district court's finding that Patti's conduct warranted an obstruction of justice sentencing enhancement pursuant to U.S.S.G. § 3C1.1. Of the three grounds upon which the district court relied to enhance Patti's sentence, the court of appeals found that "two of those grounds independently support the obstruction enhancement" and refused to address the third. App., *infra*, 13a & n.13.[7] The district court's third obstruction finding – referred to as Patti's "media campaign" – was apparently based on (1) Patti's "attempts" to "intimidate and influence" the investigative agents, grand jurors, and the trial judge; (2) Patti's false denials of guilt to the public; (3) Patti's threats to close one of Patti's businesses if convicted; and (4) the supposed resulting need to transfer the trial to the Tallahassee Division.

a. The court of appeals failed to determine expressly whether the record showed that Patti's sentence would have been the same given that only two of the three obstruction grounds were upheld. In *Williams v. United States*, 503 U.S. 193 (1992), this Court held that where a

[7] The two grounds upheld by the court of appeals involved a finding that Patti feigned amnesia and that he was involved in an arson attempt at his accountant's office. *Id.* at 13a-15a. The third ground, which the court of appeals declined to address, involved a finding that Patti engaged in a "media campaign." *Id.* at 13a & n.13.

sentencing court departs upward on both valid and invalid factors, remand is required unless the reviewing court determines that the sentence imposed was reasonable *and* the sentencing court would have imposed the same sentence absent reliance on the invalid factors. *Id.* at 203. The burden is on the government to establish that the same sentence would have been imposed despite the error. *See United States v. Price*, 65 F.3d 903, 912 (11th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996); *United States v. Kendrick*, 22 F.3d 1066, 1069 (11th Cir. 1994).

b. The rationale of this Court's *Williams* decision has not been limited to departures; rather, it has been held by circuit courts to be equally applicable to adjustments affecting the Sentencing Guidelines calculation. *See, e.g.*, *United States v. Thayer*, 201 F.3d 214, 229-30 (3d Cir. 1999), *cert. denied*, 530 U.S. 1244 (2000); *United States v. Kendrick*, 22 F.3d at 1068-70; *United States v. Tello*, 9 F.3d 1119, 1131 (5th Cir. 1993).

c. The district court relied upon three obstructive acts in reaching its sentencing determination. App., *infra*, 13a. The multiple act finding was the linchpin of the district court's entire sentencing determination and all of its sentencing findings. *Id.* at 36a-45a. Without a finding on each of the "multiple obstructive acts," the district court may have granted the acceptance of responsibility adjustment, a downward departure, or at least sentenced Patti at the low end of the guideline range. The district court provided no indication that the same sentence would have been imposed absent the third obstructive act.

d. The court of appeals ignored the third obstructive act, which was based on Patti's alleged "media campaign." App., *infra*, 13a & n.13. Other than its statement that

"two of those grounds independently support the obstruction enhancement" (App., *infra*, 13a), the court of appeals made no attempt to determine whether the government satisfied its burden of demonstrating that Patti's sentence would have been the same. This Court's decision in *Williams* compels that the appellate court reach all issues underlying the obstruction enhancement which the district court determined were critical to all its sentencing decisions.[8] The court of appeals ignored this Court's binding precedent and its conduct undercuts the carefully proscribed procedures created by this Court to ensure fairness in the sentencing process under the Sentencing Guidelines.

e. The ruling of the court of appeals conflicts with other circuits, including the cases cited above, which have reviewed all grounds stated as supporting either a sentencing departure or adjustment. *See, e.g., United States v. Knight*, 266 F.3d 203, 206-10 (3d Cir. 2001) (remanding for resentencing due to error in criminal history score and employing plain error standard where record failed to show that sentence was unaffected by error); *United States v. Corley*, 978 F.2d 185, 186-87 (5th Cir. 1992) (remanding as a result of error in criminal history score); *United States v. Rodriguez-Razo*, 962 F.2d 1418, 1423-24 (9th Cir. 1992) (remanding for resentencing after reversing obstruction of justice enhancement); *United States v. Willard*, 909

[8] Patti respectfully suggests that none of the conduct complained of would justify a sentencing enhancement either because Patti's conduct, such as threatening to close one of his businesses if convicted, was clearly not obstructive, or the alleged media activities were otherwise protected by the First Amendment. *See United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987).

F.2d 780, 781-83 (4th Cir. 1990) (remanding for resentencing where court failed to resolve dispute as to guideline range or state that sentence would have been the same regardless of such resolution). While some circuits have adopted an "overlapping range" form of harmless error analysis, *see United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1998), we have found no case where a court failed to undertake the requisite analysis required by this Court's precedent but merely ignored it in affirming a conviction.

f. The error was especially critical here where the multiple obstructive acts were used not only to enhance Patti's sentence but also as a basis for failing to reduce Patti's sentence on multiple available grounds. This Court's decision in *Williams* should mandate a resentencing on all portions of the sentence affected by the failure to reach the obstruction of justice finding.

g. Moreover, the court of appeals clearly erred in affirming at least one of the other two obstructive acts. The district court found that Patti was involved in an alleged arson attempt at the office of his then-accountant. App., *infra*, 37a-38a. The court of appeals affirmed, finding that a co-conspirator's testimony was sufficient. *Id.* at 14a-15a. The court of appeals ignored the fact that the co-conspirator never mentioned meeting with Patti or speaking to him. Indeed, there was no direct evidence presented that connected Patti to the arson attempt. This petition thus raises the important and recurring federal issue, in the context of a sentencing hearing, of the minimum quantum of evidence required to sustain a sentencing enhancement. *See* U.S.S.G. § 6A1.3 (sentencing court may only rely upon "information [that] has sufficient indicia of reliability to support its probable accuracy").

For this reason, the Court should issue a writ of certiorari to review the Eleventh Circuit's decision in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 15, 2003

337 F.3d 1317

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Frank M. PATTI, Sr., Defendant-Appellant.

No. 02-13871.

July 18, 2003.

Ian M. Comisky, Matthew D. Lee, Blank, Rome, Comisky & McCauley, LLP, Philadelphia, PA, for Patti.

Randall Joseph Hensel, Robert G. Davies, Pamela A. Moine, Asst. U.S. Atty., Pensacola, FL, for U.S.

Appeal from the United States District Court for the Northern District of Florida.

Before MARCUS and WILSON, Circuit Judges, and RESTANI*, Judge.

WILSON, Circuit Judge:

Frank M. Patti, Sr. appeals the seventy-nine-month sentence he received after he pled guilty to filing a false income tax return in violation of 26 U.S.C. § 7206(1), and conspiring to defraud the United States in violation of 18 U.S.C. § 371. He asserts that the district court abused its discretion by denying his motion for recusal and that the district court erred in sentencing him by miscalculating

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

the tax loss and by enhancing his sentence for obstruction of justice.[1]

BACKGROUND

On May 31, 2000, a grand jury returned a sealed, eight-count indictment, charging Patti with various tax violations. The case was assigned to Judge Lacey A. Collier, and the trial was scheduled to begin on May 29, 2001. Before the case went to trial, however, Patti filed a motion for recusal pursuant to 28 U.S.C. § 455(a).[2] Judge Collier denied that motion on March 13, 2001. Although Patti filed supplemental evidence to support his § 455(a) motion after the initial denial,[3] Judge Collier filed a supplemental order denying the motion after receiving that evidence.

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[1] Patti also asserts that (1) the district court abused its discretion with respect to several discovery rulings; (2) the district court erred in awarding costs; (3) the district court erred at sentencing by failing to grant him a departure for acceptance of responsibility, enhancing his sentence based upon his aggravating role in the offense, applying the sophisticated concealment adjustment, and failing to grant him a downward departure; and (4) his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). As we find that those issues lack merit and do not require any discussion, we will not address them herein.

[2] Essentially, Patti's motion was based upon a conversation he had with a man who alleged that he was friends with Judge Collier and that he could get the charges dropped if Patti donated a large sum of money to a charity that the judge was associated with at the time. Patti also asserted that Judge Collier knew the United States attorney and supported his reappointment.

[3] That evidence consisted of a letter from Micki Conti, Judge Collier's mother's caretaker, which indicated that Judge Collier discussed certain aspects of Patti's case in front of her and others.

Thereafter, a setback arose when Patti injured himself in a car accident. The accident brought into question Patti's competency to stand trial, as he claimed that he had amnesia and could not recall the facts surrounding the alleged tax evasion. As a result of the injuries, Patti was committed to a federal medical center pursuant to 18 U.S.C. § 4241(d)(1). In February of 2002, after a hearing, Judge Collier found that Patti was malingering and that he was competent to stand trial. Thus, a new trial date of April 15, 2002 was established. Patti, however, agreed to plead guilty to filing a false tax return and conspiring to defraud the United States, two of the counts charged in the twenty-four-count second superseding indictment, and his plea was accepted on April 12, 2002. Thereafter, the district court sentenced him to seventy-nine months of imprisonment. This appeal followed.

DISCUSSION

I. Motion for Recusal

Patti asserts that Judge Collier abused his discretion by denying his motion for recusal. The government, however, asserts that we cannot review the denial of Patti's motion, because Patti waived his right to raise that issue by entering an unconditional guilty plea.

Generally, a voluntary, unconditional guilty plea waives all nonjurisdictional defects in the proceedings. *United States v. Fairchild*, 803 F.2d 1121, 1124 (11th Cir.1986) (per curiam). Although we have addressed several types of claims that have been waived by entering an unconditional guilty plea, *see, e.g., United States v. Wai-Keung*, 115 F.3d 874, 877 (11th Cir.1997) (per curiam) (holding that a defendant waived his right to appeal the validity of a

search); *Fairchild*, 803 F.2d at 1124 (holding that a defendant waived his right to appeal on the grounds of prosecutorial vindictiveness), we have not addressed whether a defendant waives his right to appeal the district court's denial of a motion for recusal under § 455(a) by entering an unconditional guilty plea.[4] Our sister circuits that have considered that issue, however, have come to opposite conclusions, thus creating a circuit split. *See United States v. Hoctel*, 154 F.3d 506, 507-08 (5th Cir.1998) (holding that a defendant waives his right to appeal the denial); *United States v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.1988) (holding the same); *see also United States v. Troxell*, 887 F.2d 830, 833 (7th Cir.1989) (holding that the defendant waived her right to appeal the denial of her § 455(a) motion because the "denial of a motion for recusal based on the appearance of impropriety can be challenged only with a writ of mandamus"). *But see United States v. Brinkworth*, 68 F.3d 633, 637-38 (2d Cir.1995) (holding that a defendant does not waive his right to appeal the denial); *United States v. Chantal*, 902 F.2d 1018, 1020-21 (1st Cir.1990) (holding the same). For the following reasons, we agree with the Fifth and Tenth Circuits and hold that a defendant waives his right to appeal the denial of a § 455(a) motion by entering an unconditional guilty plea.

Section 455 creates two primary reasons for recusal. *See* 28 U.S.C. § 455(a)-(b). A judge should recuse himself under § 455(a) when there is an appearance of impropriety. *See id.* § 455(a). Section 455(a) provides, "Any justice,

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[4] As this issue presents a question of law, we review it de novo. *See United States v. Smith*, 289 F.3d 696, 706 n. 11 (11th Cir. 2002) (noting that questions of law are reviewed de novo).

judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Thus, the standard of review for a § 455(a) motion "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir.1988), and any doubts must be resolved in favor of recusal, *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir.1989).

On the contrary, a judge should recuse himself under § 455(b) when any of the specific circumstances set forth in that subsection exist, which show the fact of partiality. 28 U.S.C. § 455(b)(1)-(5).[5] For example, a judge should recuse

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[5] Section 455(b) provides that a judge shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(Continued on following page)

himself "[w]here he has a personal bias or prejudice concerning a party" or "[w]here in private practice he served as [a] lawyer in the matter in controversy." *Id.* § 455(b)(1)-(2). Recusal under this subsection is mandatory, because "the potential for conflicts of interest are readily apparent." *Murray v. Scott*, 253 F.3d 1308, 1312 (11th Cir.2001) (internal quotation marks omitted).

Thus, the differences between the two subsections are evident. While subsection (b) sets forth specific circumstances requiring recusal, which establish the fact of partiality, subsection (a) sets forth a general rule requiring recusal in those situations that cannot be categorized neatly, but nevertheless raise concerns about a judge's impartiality. *See* 28 U.S.C. § 455(a)-(b). Although both subsections provide reasons for recusal, subsection (b) is stricter than subsection (a) because the need for a judge's

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(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(b)(1)-(5),

recusal under subsection (b) is clear; once it has been established that one of the enumerated circumstances exists, there can be no dispute about the propriety of recusal. Under subsection (a), however, whether recusal is necessary is not as readily apparent. As subsection (a) does not set forth specific circumstances requiring recusal and instead provides a general rule requiring recusal when there is an appearance of impropriety, we must ask "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker*, 855 F.2d at 1524.

Indeed, the treatment of subsections (a) and (b) under § 455(e) further demonstrates the differences between these subsections. Section 455(e) provides, "No justice, judge, or magistrate judge shall accept from the parties . . . a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."[6] 28 U.S.C. § 455(e). Thus, a party can waive recusal under § 455(e) when the motion is brought pursuant to § 455(a), but cannot waive recusal when the motion is brought pursuant to § 455(b).

In light of the differences between subsections (a) and (b), particularly Congress's express provision for waiver of

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[6] We clearly have "a full disclosure on the record of the basis for disqualification" in this case. 28 U.S.C. § 455(e). Patti raised the various grounds on which he thought recusal would be appropriate, and the district court clearly set forth those grounds in its orders denying the motion.

recusal under subsection (a), we conclude that the "denial of recusal is a pretrial defect which is sublimated within a guilty plea and thereafter unavailable as an issue for appeal." *Gipson*, 835 F.2d at 1325.[7] Accordingly, Patti waived his right to appeal the denial of his motion for recusal when he entered his unconditional guilty plea.

Moreover, we find it noteworthy that Patti failed to avail himself of the options that were available for obtaining review of the denial of his motion for recusal. Indeed, Patti immediately could have petitioned this Court for a writ of mandamus upon the denial of his motion, or he could have requested permission from Judge Collier to enter a conditional guilty plea in which he reserved the right to appeal the district court's denial of his motion. Although Patti asserts that neither alternative was viable,[8] he did not attempt to exercise either option. As a

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[7] The First and Second Circuits base their holdings upon the belief that the appearance of impropriety goes to the heart of the judicial proceedings and fundamental fairness. *See Brinkworth*, 68 F.3d at 637-38; *Chantal*, 902 F.2d at 1020-21. Although the integrity of the judiciary and the public's confidence in the judicial system clearly prompted Congress to enact this statute, Congress expressly provided for waiver in § 455(a) cases. Thus, the statutory provision itself indicates that the appearance of impropriety, although important, was not as critical as the fact of impartiality. Moreover, as we have held that other significant issues can be waived by entering an unconditional guilty plea, this decision is consistent with our precedent. *See, e.g.*, *Fairchild*, 803 F.2d at 1124.

[8] With respect to the conditional guilty plea, Patti asserts that both the government and the district court must accept such a plea and that neither the government nor the district court would have accepted such a plea if requested. *See Chantal*, 902 F.2d at 1021 (noting that requiring a defendant to request an unconditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) "has even more devastating implications than an outright denial because of the plea of guilty. The very terms of

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result, we find his arguments regarding the futility of these options unavailing.

Thus, the district court's denial of the motion for recusal under § 455(a) is not reviewable. We therefore offer no opinion about the merits of Patti's motion.

II. Sentencing

"We review the district court's application of the Sentencing Guidelines *de novo*, and its findings of fact for clear error." *United States v. Wilson*, 183 F.3d 1291, 1300 n. 16 (11th Cir.1999).[9]

A. Calculation of Loss

We review the district court's calculation of the amount of loss for clear error. *United States v. Renick*, 273 F.3d 1009, 1025 (11th Cir.2001) (per curiam).

Rule (11)(a)(2) prevent the entry of a conditional plea of guilty without the consent of the trial judge."). With respect to the writ of mandamus, Patti concedes that a defendant can challenge a denial by filing a petition for a writ of mandamus in this Circuit, *see Wyatt ex rel. Rawlins v. Rogers*, 92 F.3d 1074, 1081 & n. 17 (11th Cir. 1996), but asserts that writs are issued only in exceptional circumstances, *see In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961-62 (5th Cir. 1980).

[9] Although Patti asserts that the district court should have applied a heightened standard of review at sentencing because of the various enhancements, "it is the settled law of this circuit that at sentencing, a federal defendant's due process rights are . . . satisfied by the preponderance of the evidence standard." *United States v. Jackson*, 57 F.3d 1012, 1019 (11th Cir.1995) (alteration in original) (internal quotation marks omitted).

The district court calculated the tax loss as $4,791,267.18 under the sentencing guidelines and thus determined that Patti's base offense level was twenty-one. Patti asserts that the district court erred in calculating the tax loss, because it aggregated the corporate and personal tax losses.[10]

Whether the tax loss can be calculated by aggregating the corporate and personal tax losses is an issue of first impression in this Circuit. Several of our sister circuits, however, have addressed this issue. The Second and the Seventh Circuits found that it is inappropriate to aggregate the corporate tax loss and the personal tax loss, because doing so overstates the tax revenue lost. *See United States v. Martinez-Rios*, 143 F.3d 662, 672 (2d Cir.1998); *United States v. Harvey*, 996 F.2d 919, 920-22 (7th Cir.1993). The Sixth Circuit took a contrary view in *United States v. Cseplo*, 42 F.3d 360, 364-65 (6th Cir.1994), holding that the guidelines clearly provide for aggregation and that by aggregating the amounts the calculation reflects the seriousness of the harm the defendant caused.

We believe that the aggregation of personal and corporate tax losses is called for under the guidelines. The version of the guidelines that the district court applied in this case provided that "[i]f the offense involves both

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[10] Patti also asserts that the district court failed to make particularized findings pursuant to Federal Rule of Criminal Procedure 32(c)(1) that each item of tax fraud calculated into the loss was "willful," that the district court erred in finding that the money he took from his companies constituted constructive dividends that should have been reported on his personal tax returns, and that certain tax adjustments were improper. As we find that these issues were addressed properly by the district court, we decline to address them further.

individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together." U.S.S.G. § 2T1.1, cmt. n. 7. Thus, as the Sixth Circuit noted, "[t]he guidelines [we]re very specific about the necessity of aggregating the tax losses." *Cseplo*, 42 F.3d at 364. In addition, a defendant "ha[s] the opportunity and ability to limit the criminal consequences to one or other of the returns. . . . By choosing to falsify both returns, [he] ma[kes] the deliberate decision to produce separate harm to the government with respect to both tax liabilities." *Id.* at 364-65 (internal quotation marks omitted). Thus, we believe that the defendant should be held accountable for both harms, and we do not believe that the possibility of a lower tax liability had the taxes been reported properly should change that result. *See id.* at 364-65 & 365 n. 6 (noting that "[i]f [the defendant's] unorthodox maneuvers resulted in a higher aggregate tax liability than would have existed otherwise, that is a risk [he] chose to run when he elected to break the law").

Furthermore, the sentencing guidelines were amended in 2001, and the commission adopted the Sixth Circuit's view. *See* U.S.S.G. § 2T1.1, cmt. n. 7 (providing that "[i]f the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together" (emphasis added)). Although Patti asserts that the amendment was substantive, we disagree. The commentary provides that it "clarifies the prior rule in Application Note 7 of § 2T1.1 [sic] that if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together." U.S.S.G. supp. to app. C 191 (2001) (emphasis added) (internal quotation marks omitted). Thus, this recent

amendment further supports our decision to permit the aggregation of corporate and personal tax losses. *See United States v. Perulena*, 146 F.3d 1332, 1337 n. 11 (11th Cir.1998) (noting "that amendments that do not effect a substantive change, but rather are intended only to clarify the rule adopted by a particular guideline . . . constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline" (alteration in original) (internal quotation marks omitted)).

Thus, the district court properly calculated the tax loss.[11]

B. Obstruction of Justice

We review the district court's determination that the defendant's conduct warrants an obstruction of justice enhancement for clear error. *United States v. Garcia,* 208 F.3d 1258, 1261 (11th Cir.2000), *vacated on other grounds by* 531 U.S. 1062, 121 S.Ct. 750, 148 L.Ed.2d 653 (2001). The district court should increase a defendant's base offense level by two if

> the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant

[11] As we find that the district court properly calculated the tax loss, we also find that the district court properly calculated the fine and restitution amounts.

> offense of conviction, and . . . the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.

U.S.S.G. § 3C1.1.[12]

Here, there were three grounds upon which the district court relied to enhance Patti's sentence. As we find that two of those grounds independently support the obstruction enhancement, we decline to address the third.[13]

First, the district court found that Patti feigned amnesia and noted that his malingering postponed the trial for a year and forced the government to waste time and resources in evaluating his competency. Patti asserts that the district court erred in basing the enhancement upon its determination that he feigned amnesia in his competency hearing, because such a ruling will chill

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[12] Patti asserts that the district court erred in applying the 1998 version of the guidelines, quoted above, in this case. He argues that the 1997 version clearly provides that obstruction can be considered only with respect to the "instant offense." We, however, need not consider which version the district court should have applied, because all of the conduct relied upon by the district court in this case relates to Patti's attempts to obstruct the investigation and prosecution of the instant offense. Thus, under either version, the district court properly relied upon Patti's obstructive acts in enhancing his sentence.

[13] The district court also based this enhancement upon Patti's "media campaign." As there were two independent grounds to support that enhancement, we need not consider the propriety of enhancing a defendant's sentence based upon statements made to the media.

defendants' willingness to raise competency issues.[14] We, however, disagree and, like the Fifth Circuit, find that

> applying the obstruction enhancement to defendants who willfully feign incompetency in order to avoid trial and punishment does not unconstitutionally chill a defendant's right to seek a competency hearing. While a criminal defendant possesses a constitutional right to a competency hearing if a bona fide doubt exists as to his competency, he surely does not have the right to create a doubt as to his competency or to increase the chances that he will be found incompetent by feigning mental illness. . . . [This ruling does not] put defense counsel to the Hobson's choice of forgoing competency hearings for a client who may well be incompetent . . . or requesting such hearings and exposing the client to the risk of a § 3C1.1 enhancement if he is ultimately found competent. Counsel should warn his client that feigning incompetency, whether to create doubt as to his competency so as to prod his attorney into requesting competency hearings or to convince the court that he cannot stand trial, will trigger a § 3C1.1 enhancement.

See United States v. Greer, 158 F.3d 228, 237-38 (5th Cir.1998).

Second, the district court found that Patti was involved in the attempted arson at his accountant's office,

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[14] Patti also seems to assert that the district court erred, because it failed to connect the obstruction to any hampering or impeding of testimony. The guidelines, however, provide that the enhancement is proper when one obstructs "or *attempt[s] to obstruct* or impede, the administration of justice." *See* U.S.S.G. § 3C1.1 (emphasis added).

which was undertaken to destroy documents relevant to his tax fraud. Patti asserts that there was insufficient evidence to connect him to the attempted arson and that the district court relied upon unreliable hearsay in determining that he was involved in the arson. Although Patti asserts that the district court based its ruling upon unreliable hearsay, one of the coconspirators in that arson testified at the sentencing hearing; his testimony about the statements of fellow coconspirators did not constitute hearsay.[15] *See* Fed.R.Evid. 801(d)(2)(E) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."). Moreover, even if this testimony were considered hearsay, the law of this Circuit clearly provides that reliable hearsay can be considered at sentencing. *Wilson*, 183 F.3d at 1301 ("A court may consider any information (including hearsay), regardless of its admissibility at trial, in determining whether factors exist that would enhance a defendant's sentence. . . . "). The district court may rely upon such evidence "as long as the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence." *United States v. Anderton*, 136 F.3d 747, 751 (11th Cir.1998) (per curiam). As the district court found the coconspirator's testimony credible and there was sufficient indicia of reliability, the district court properly relied upon the coconspirator's testimony about the arson.

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[15] Essentially, the coconspirator testified that other coconspirators told him that the objective of the arson was to destroy two documents by setting fire to the accountant's office.

Thus, the district court did not err in enhancing Patti's sentence under section 3C1.1.

CONCLUSION

Accordingly, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 3:00-cr-44/LAC

FRANK M. PATTI, SR., /

ORDER DENYING MOTION TO DISQUALIFY

(Filed Mar. 13, 2001)

Defendant Frank M. Patti, Sr., seeks disqualification of this judge, not for actual bias or prejudice, but because of the appearance of partiality. After a review of the defendant's motion and affidavits (doc 51), the government's response (doc 55), and applicable case law and other legal authority, the court **DENIES** the motion for the following reasons.

Preliminary

In its response, the Government has moved to strike Patti's personal affidavit since he has, through his lawyer, claimed his Fifth Amendment right against self incrimination and would refuse to answer any questions about the affidavit. Generally, a person who offers testimony can not thereafter limit inquiry on that testimony. Arguably, the defendant's assertion of his Fifth Amendment right to prohibit inquiry into the allegations in his affidavit requires that the affidavit be stricken and not considered. *See Taiwan v. United States Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 719-20 (9th Cir. 1997); *Edmond v. Consumer Protection*

Div., 934 F.2d 1304, 1307-09 (4th Cir. 1991); *United States v. Parcels of Land*, 903 F.2d 36, 43-44 (1st Cir. 1990); *United States v. Panza*, 612 F.2d 432, 438-39 (9th Cir. 1980). However, having determined that the defendant's motion to disqualify should be considered on its merits, the Court will not address this issue but will proceed on the motion without striking the affidavit.

The Government also seeks to have the motion denied as untimely. It correctly cites that an objection to a judge must be made by motion before trial or as soon as the alleged bias is discovered or risk waiver of the objection. In Patti's affidavit, he offers that the last statement made to him by Mike Murphy included an offer or suggestion of "bribery," which he, Patti, considered a possible crime, and that it was made on 15 February 2001 – twenty-two days before his motion was filed in court on 9 March 2001. The Government correctly points out that this was immediately before a scheduled hearing on motions that had been filed and briefed resulting in the cancellation of the hearing.

While one may question such a long wait to report a possible crime which Patti's affidavit suggests was of such impact that it caused him to question the undersigned's impartiality and question the significance of that delay until just before proceedings are scheduled to begin, the Court declines to find that the delay mandates denial of the motion to disqualify.

Standard

Defendant moves for disqualification of this judge pursuant to 28 U.S.C. § 455(a). which provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

As amended in 1974, § 455 places the judge under an affirmative, self-enforcing obligation to rescue himself *sua sponte* whenever the proper grounds exist. *See United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). It abolished the "duty to sit" doctrine[1] in favor of the new requirement that judges resolve any doubts they may have in favor of disqualification. *Id.* Under § 455(a), the Court applies an objective reasonableness standard and must determine "whether an objective, disinterested, lay observer ***fully informed*** of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Id.* at 744-45 (quoting *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989)) (internal quotation marks omitted) (emphasis added); *see also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523-24 (11th Cir. 1988).

When moving for disqualification pursuant to § 455, a party may, but is not required to, submit an affidavit in support of the recusal motion. However, if an affidavit is filed, as Defendant has done in this case, the Court is not required to accept all of the moving party's allegations as

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[1] The "duty to sit" doctrine required a judge to hear a case unless a clear demonstration of extrajudicial bias or prejudice was made by the moving party. *Kelly*, 888 F.2d 732 at 744 (citing *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987)).

true. *See Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1019 n.6 (5th Cir. Unit A Feb. 1981) ("If a party could bind a judge by his factual allegations in a section 455 motion, free from the formal requirements and more demanding standard of proof of section 144,[2] the result would be a virtual open season for recusal.").[3]

Discussion

In his motion to disqualify, the defendant has submitted two affidavits – that of the Alice G. Guy, his general manager of Joe Patti Seafood Company and publicly known as his long-time fiancée, and his own.

Guy's affidavit contains snippets from conversations allegedly had with a Mike Murphy during "the last year" in which he claimed among other things that he, this judge, and U.S. Attorney Mike Patterson were friends. She further alleges that Murphy told her on many occasions, "I'm not going to let anything happen to Frank. He's my

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[2] Title 28 U.S.C. § 144 also governs disqualification of a judge from a judicial proceeding. That section requires that the party seeking recusal file a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. Contrary to § 455, under § 144 "the judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged." *Phillips* 637 F.2d at 1019. In the case *sub justice*, the defendant has not moved for disqualification pursuant to § 144, and the Court will not address that standard.

[3] In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

friend." She quotes him as stating, "If there's anything I can do, I'll do it." She acknowledges that these comments were said in the context of helping Frank Patti. She even says that he called her within the last month and said he was going to lunch with "his friends" and that "everything was going to be alright."

The allegations contained in Guy's affidavit, even if accepted as true, are patently insufficient to create any issue from which an objective, disinterested, lay observer could possibly entertain a significant doubt about this judge's impartiality. Statements made during "the last year" lose all significance when the observer realizes that no judge, this judge or any other, had been publicly assigned to this case during that year until just ten days before the affidavits were filed.

Such bare claims by a Mike Murphy that he is "responsible" for getting Patterson his job as U.S. Attorney – a Presidential appointment – would be summarily dismissed by any objective and disinterested lay observer. That observer would require something more than an unsubstantiated claim that he lunches with the judge two to three times a week to accept that as true and draw any inference from it. The simple fact that Murphy may have made these statements is of no relevance. Even accepting the affiant's claims that Murphy said the things alleged, Guy can not personally attest to the truth of any fact she offers except for the single and irrelevant fact that she is the general manager of Joe Patti Seafood Company. All else is rank hearsay and not normally accepted in court proceedings. The objective, disinterested, lay observer would have no basis in facts to question the judge's impartiality toward Patti.

The fact is, if anyone could raise a question from the allegations in Guy's affidavit, it is the Government. Drawing every inference, innuendo, or assumption from the claims, an objective, disinterested, lay observer might be concerned about the judge favoring defendant Patti if, as alleged, one of the judge's close friends is going to do anything he can to "not let anything happen to Frank."

It is of relevance to note that if Murphy had the influence the alleged statements suggest and he acted upon it, we would not be here today.

Defendant, Frank M. Patti, Sr., in his affidavit expresses his concern that this judge may have expressed support for the reappointment of Mike Patterson as U.S. Attorney as reported in the gossip column of a local weekly newspaper while he has been critical of Mr. Patterson's Office and its conduct of the investigation of his tax fraud and other related cases. He states that he has caused complaints about the investigation to be made to various authorities, some of which he lists. Patti does not and can not allege that this judge knew of these complaints or has any knowledge of the investigation beyond the record of this case.

The objective, disinterested, lay observer, fully informed, would not question the partiality of a judge for expressing an opinion of the competency of an applicant to those charged with the selection and ultimate appointment of a new U.S. Attorney. The fully informed observer would know that judges are frequently called upon to express an opinion concerning the competence of persons being considered for positions within the justice system such as judges, magistrates, public defenders, U.S. attorneys and assistants, panel attorneys, clerks, probation

officers, and the like. The lead defense attorney is well aware of this; as he acknowledged in court on 9 March 2001, this judge had been complimentary in support of him in his application for a federal position.

Patti seems concerned that this judge will not deal fairly with him because of perceived favoritism toward Mr. Patterson. For the reasonable observer to be able to entertain a significant doubt about this judge's impartiality, the observer must be *fully informed* of the underlying facts – all of them. Well within the easy reach of the defense team, the pubic [sic] records of this District show that this judge has ruled against the U.S. Attorney's Office in many cases – *i.e.*, *U.S. v. Fish, et al.*, 3:96-cr-73/LAC (ordering a judgment of acquittal of five defendants in a significant case of fraud against the Government (NASA), which threatened the safety of the space shuttle launch system and the launch schedule); *Sparkman v. U.S.*, 3:90-cv-30093/LAC (awarding $976,000 to a plaintiff against the Government); *U.S. v. Griffin, et al.*, 3:00-cr-75/LAC (dismissing two counts of obstruction of a criminal investigation against two defendants); *U.S. v. Newell*, 5:94-cr-5014/LAC (ordering a judgment of acquittal for a drug conspiracy charge); *U.S. v. Henrickson, et al.*, 5:97-cr-20/LAC (ordering a judgment of acquittal of six defendants for conspiracy to defraud the United States and multiple counts of bank fraud).

Additionally, every case in which there is perceived to be some error by this court or evidence of bias, an appeal can be, and usually is, taken to the Eleventh Circuit Court of Appeals where the conduct of this judge is scrutinized in minute detail. Any pattern of favoritism toward either of the prosecution or defense would be clear from the opinions of the appellate court – no such pattern has been

noted. With these record facts, again well within the easy reach of the defense team, the objective observer would have no cause to doubt the impartiality of this judge.

The defendant also alleges that he has "been told by a retired [anonymous] Pensacola Police Officer who claimed to have worked with them that Judge Collier and Mr. Patterson had for four years worked closely together as prosecutors in the local prosecutor's office and that Mr. Patterson was Judge Collier's 'protege'." Again, to draw any inference the observer must be *fully informed* of all of the facts including who the unnamed police officer is. He would then be informed from the public records of the State Attorney's Office that Mr. Patterson was employed by the State Attorney in the Pensacola Office in October of 1983. This judge was the supervisor of the Shalimar Office of the State Attorney at the time, some fifty miles away, and left the State Attorney's Office in late February 1984 upon appointment by the Governor as a Florida State Circuit judge just some four to five months after Patterson's hiring. The record will further reveal that this judge and Mr. Patterson never participated in a single case together. These facts demonstrate the fallacy of relying on unverified statements from unnamed sources; no objective, disinterested, lay observer would do so. This allegation is rejected as completely false – a lie. (This is a perfect example of the dangers of basing a claim upon hearsay, and why courts throughout the land normally reject hearsay.)

Defendant Patti, as did his fiancée, claims that a "man named Mike Murphy" had made certain statements claiming to be friends with Mr. Patterson and this judge and suggesting some influence with them. These alleged statements by Murphy and their lack of authentication as

well as their pro-Patti leanings have been discussed earlier, but it is noted again that there is not one single statement of verifiable fact that connects any of the claims to this judge. To do so is rank speculation and not permitted an objective, disinterested observer.

Certain specific claims must, however, be addressed. Patti claims Murphy said that he had discussed Patti's case with this judge in "hypothetical terms." What this means is unclear, but true or not, it has not been alleged that Murphy had any knowledge of the facts of the Government's allegations or Patti's defense. Hence, any "hypothetical" discussion, whatever that is, could not disqualify the judge. He could not have learned anything more then Patti himself had already made public through his media campaign.

Patti also claims that he was solicited with "graveyard talk" by Murphy to make a contribution to the "Westgate Center," a particular charity in which this judge had an interest. While it can not be divined what "graveyard talk" is, Patti claims this conversation took place "on approximately Thursday, February 15, 2001." This Court notes, as would a fully informed observer, that February 15th is seven days before the defendant's arraignment on February 22nd before Magistrate Susan Novotny, who for the first time announced publicly that this judge would be trying the case. It is hard for a reasonable observer to imagine such a serious discussion as alleged concerning the "bribery" of a judge who at the time was not known to be the judge assigned to try the case. The smell of this allegation becomes even ranker when the record reveals that no one on the defense side knew when an indictment would be returned by the Grand Jury against Patti, if at all. As far as was publicly known – grand jury proceedings are

secret – an indictment, if any, could have been returned the day it was, the next week, the next month, the next year – only then would the presiding judge be announced.

What a loan made to Murphy in October has to do with any fears or concerns Patti now has is not apparent. It only serves to demonstrate the close friendship between Murphy and Patti which had existed for at least a year. How a subsequent rejection – time unknown – relates to this issue is not clear, and Patti offers nothing to suggest a connection or why that would cause him concern.

Murphy's ramblings, even if true, are not tied in any direct way to this judge. There is no allegation, and none can be made, that this judge was ever approached by Murphy or anyone else to influence the outcome of this case. To allow allegations of a third-party's actions, actions which have not been verified or connected to the judge, to serve as a basis for disqualification would create the opportunity for mischief.

Conclusion

In passing § 455, Congress cautioned that the grounds upon which a judge's impartiality may be questioned must be reasonable when judged by objective standards.

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a

> judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitle [sic] to judges of their own choice.

S. Rep. No. 93-419 (1973), *quoted in* 13A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE; JURIS 2D § 3549, at 623-34.

Disqualification is appropriate only if the facts provide what an objective, disinterested, knowledgeable, lay observer would find to be a reasonable basis for doubting a judge's impartiality. Were less required, a judge would be forced to step aside in difficult cases at the mere sound of controversy or a defendant could avoid adverse decisions by simply alleging the slightest of factual bases suggesting bias. To find otherwise would allow an unscrupulous defendant, or an irresponsible, mischievous, or careless third-party to control the choice of a judge. This can not be permitted.

In this case, there is nothing beyond the questionable assertions of Patti to even suggest the possibility of partiality. This is not enough. There are no facts in the record of this case, and this judge knows of none, for this Court in applying an objective reasonableness standard to find that an objective, disinterested, lay observer, when fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt about this judge's impartiality.

The motion to disqualify (doc 51) is **DENIED**.

ORDERED this 13th day of March, 2001.

/s/ Lacey A. Collier
Lacey A. Collier
United States District
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

UNITED STATES OF AMERICA,

v. Case No. 3:00-cr-44/LAC

FRANK M. PATTI, SR.

_____/

SUPPLEMENTAL ORDER DENYING MOTION TO DISQUALIFY

(Filed May 21, 2001)

Defendant has supplemented the record of his prior Motion to Disqualify Judge Lacey Collier (doc. 51) with a letter from a Micki Conti (doc. 139), which attempts to allege improper conduct on the part of this judge. The Court adopts and incorporates the legal discussion in its previous Order Denying Motion to Disqualify (doc. 64).

Ms. Conti was the care giver to the judge's mother and admits now that she and her family are friends with the Patti family. Ms. Conti's son's relationship with Patti has never been a secret, however, her own personal relationship with Patti and his family was not previously revealed. She alleges that conversations were had in which certain matters concerning this case were discussed.

These intimate "family" conversations with the judge's ninety-five year old mother which included Ms. Conti – a long time and trusted friend who had for many, many years provided love and care to this elderly lady – and consisted of explanation and discussion of the publicity surrounding the Patti case simply can not be considered as a violation of any rule of appropriate conduct. The conversations took place in the public dinning [sic] hall at the

care-giving facility in the presence of forty plus residents and guests, the meal providers, and the care givers. All were conducted in a loud conversational tone to accommodate the judge's mother's severe hearing impairment. To suggest that any improper conversations would have taken place in such an environment and with someone known to have a family relationship with Patti is ludicrous on its face.

All alleged comments – some made in response to Ms. Conti's questions – concerned allegations appearing in the news media and the public record of the case that were made well known to the public through the preceding year-long media blitz. No reasonable person can believe that a ninety-five year old mother would have cause to inquire about a case until her son was connected with it, which, of course, had to be after the announcement of the judge assignment in February, not January. Notwithstanding, even if a personal and private conversation did occur and could be considered a violation of some rule, it does nothing to cast doubt upon this judge's impartiality. It is not claimed – nor can it be – that this judge ever uttered or even insinuated any opinion about Mr. Patti, the merits of his case, or his guilt or innocence. Interestingly enough, one of the statements alleged indicates that the judge's only concern was that Patti receive a fair trial, which is, after all, the single most important duty and responsibility of a presiding judge.

The justice system cannot permit an admitted partisan sympathizer to write an unchallenged letter and allow it to effect [sic] proceedings in a criminal matter. Although the writer seems to be claiming that she wrote just to "clear my mind," that claim must be questioned upon observing that the "clearing" needed to be notarized. Not

satisfied to "clear" her mind by sending the notarized letter to Chief Judge Roger Vinson, she also mailed a copy to the United States Attorney and provided a copy to Patti and others. Clearly, her intent was to benefit Defendant Patti by attempting to discredit the presiding judge. The shameful betrayal of confidence, love, and privacy can not be rewarded. This effort must be, and is, rejected. Regardless, this blatant attempt to aid Mr. Patti has no bearing on this judge's opinion of the defendant or his case as there is no evidence that he or his defense team played any role in the Conti writing, notarizing, or the public distribution of the letter.

The Court finds that a reasonable and disinterested person, with full knowledge of the facts, would not significantly doubt the judge's impartiality. For these reasons, the Order Denying Motion to Disqualify issued March 13, 2001 (doc. 64) is REAFFIRMED.

ORDERED this 21st day of May 2001.

/s/ Lacey A. Collier
LACEY A. COLLIER
United States
District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs. Case Number 3:00cr44

FRANK M. PATTI, SR.,

Defendant.

_____/

VOLUME VI

Sentencing proceedings held in the above-styled cause before the Honorable Lacey A. Collier, District Judge, on the 2nd day of July 2002 at One North Palafox Street, Pensacola, Florida.

* * *

[3] (Court in session. Defendant present.)

MR. COMISKY: Good morning.

THE COURT: Good morning. All right, I want to first see if I can answer all of the objections and issues that were left from what we've heard to this point.

First, with the bill of costs, I am accepting the bill of costs as amended by the Government's presentation. I've determined that the cost of the grand jury transcripts are appropriate and the cost per page is a bid price, low bidder, and that is what the Government actually pays for those transcripts. So for that reason that will be included.

As to the cost of copies, I've also determined that that is the going rate for copies, both from the clerk and from court reporters. So that will stand and be included.

All right. In general the major underlying issues that separates criminal tax violations from tax liability is intent. Intent, of course, is a mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. Intent, said in another way, intent is a state of mind which may be shown by acts, circumstances and inferences that are deducible therefrom. A taxpayer's entire course of conduct may reveal the requisite fraudulent intent. Courts do rely on a number of indicia or badges of fraud in deciding either an underpayment of tax is due to fraud, and while no single badge is [4] necessarily sufficient to establish fraud, the existence of several badges of fraud constitute persuasive circumstantial evidence of fraud.

In this case it's clear that Patti intentionally failed to report Patti Shipyard and individual income and reported false Patti Shipyard expenses in the amount as alleged by the Government. Examples of Patti's intent to conceal his tax fraud from both his accountant and the IRS include, but are not limited to, converting Pensacola Shipyard funds to multiple cashier's checks payable to himself; directing venders to provide false invoices to Pensacola Shipyard and mis-coding personal and Joe Patti Seafood expenses as Pensacola Shipyard expenses; assigning expenses for unreported boats to reported boats to conceal their construction and diverting the revenue for the unreported boats to himself or to a freely accessible escrow account; altering pay estimates and mis-coding the modification expense to conceal subsequently obtained revenue on a previously closed boat.

As to certain overarching objections that were raised, based upon the filings of the parties and the evidence presented at the hearing, including what I determine to be the reliable and credible testimony of Agent Burgess, and that's based upon the corroboration by documentary evidence and the consistency of the witness statements to which she testified, I find that the Government's calculation of the tax loss as [5] outlined in S-Taxcomp 3 is correct.

To specifically address the more substantial objections raised by the defense, which pertain to several of the tax loss calculations, first, the question that has been dubbed double taxation, Patti argued that the tax loss calculation of the unreported Pensacola Shipyard income, which he diverted to himself and failed to report as individual income, should be subtracted from the unreported dividend that he diverted to himself before calculating the tax loss for his failure to report it as personal income. Thus, Patti asks the Court to pretend that the skimmed money was less than the amount that he actually received, as if he had paid the Pensacola Shipyard corporate tax and diverted only the remaining amount to himself.

However, Patti had full command of the complete amount diverted. Patti could have limited the amount of his criminal responsibility by reporting the income on one or the other of the returns, either the Pensacola Shipyard income or his own. Instead, he chose to falsify both returns and pay neither the corporate nor the personal tax. Therefore, I find that the reasoning of the Sixth Circuit in the Cseplo case that you discussed, which has subsequently been adopted by the 2001 Sentencing Guidelines, is a more sound reasoning than that of the Seventh or the Second

Circuits. There is no reason to credit Patti for taxes that he twice did not, and chose not, to [6] pay.

As to the issue of constructive dividends, Patti argued that some of the money diverted from Pensacola Shipyard was returned to the shipyard and should, therefore, not be included in the tax loss calculation as unreported personal income. To the contrary, the Court finds that money diverted from Pensacola Shipyard to Patti was intended for his personal use, whether it was immediately used as such or loaned back to the Pensacola Shipyard. Any vague or uncertain intent to perhaps use some of the money for corporate purposes sometime in the future is insufficient where the funds were converted into Patti's absolute control and were vulnerable to his discretionary use.

By diverting Pensacola Shipyard money to himself and then loaning the money back to Pensacola Shipyard the loans were returnable to Patti tax free. And evidence was presented that Patti, in addition to covertly paying his personal expenses with shipyard money by falsely coding them as boat expenses, openly pays other personal expenses with shipyard funds by characterizing them as a loan repayment. Moreover, neither the Government's IRS special agent nor Patti's own expert was able to provide a legitimate reason for Patti's conversion of the funds to multiple cashier's checks payable to himself, further evidence of his intent to unlawfully divert money.

[7] As to various adjustments, the Government seeks multiple adjustments, obstruction of justice, sophisticated concealment, organizer or leader adjustment. Patti argues that it should be held to a higher standard of proof beyond the preponderance of the evidence standard, which is traditionally used in sentencing. And even if the Court

accepts Patti's argument as correct, the Court determines that the Government has met that burden.

As to obstruction of justice, preliminarily Patti argued that the 1997, rather than the 1998, Sentencing Guidelines should be applied because the 1997 book restricted the consideration of obstructive conduct to that which occurred during the instant offense. And the 1998 book states that obstructive conduct may relate to either the defendant's offense of conviction, including relevant conduct, or to a closely related case. The Court need not decide whether the '98 amendment was merely clarifying, and therefore applicable, because the Court finds that all of the obstructive conduct considered clearly relates to the instant offense, tax fraud, consistent with the 1997 guidelines.

Amnesia, one of the obstructions argued. The Court finds that Patti feigned amnesia to successfully delay a trial of his case. This constitutes an obstruction of justice. The simple facts are that on Friday p.m. Patti, after stating that he was never going to Tallahassee, where his trial was [8] scheduled for the following Monday, drove his truck into a stationary locomotive statically displayed on a Pensacola main thoroughfare median. From this point on he feigned amnesia, which conveniently just happened to cover the very years pertinent to the tax fraud charges against him. After many and costly evaluations by psychologists and psychiatrists, including a four month stay at Butner Federal Prison Hospital, he was found to be competent to stand trial and it was found that he was feigning amnesia. He finally admitted, although grudgingly, when entering his plea that he had a memory of the tax fraud. The lengthy record of this case is replete with evidence on this point.

The Court conducted an extensive multi-day hearing on the question of Patti's competence to stand trial and found that he did not have amnesia as claimed. Subsequent events, such as his successfully running a large business, which some have claimed only he has the detailed knowledge to run, and this despite the fact that he only took over the business during the period of the alleged amnesia, support the Court's determination. Where did the knowledge come from if he had no memory of taking over the business?

The second obstruction argued, arson. The Court finds that Patti attempted to obstruct justice in that he was responsible for the bungled attempt to burn the offices of his then accountant, Whit Brown. While acknowledging that there is [9] no direct evidence connecting him to the attempted arson, the circumstantial evidence is overwhelming. Without dispute the arson was attempted. Early on in the investigation, before the significance of two pieces of paper was known, or of how two pieces of paper might relate to Patti, and point out that there was nothing initially tying Patti to the incident or reason to even suspect a connection, that two of the participants had stated that they had been told that the purpose of the job was to burn two pieces of paper. Early on, before the event, this had been discussed with at least one participant who revealed this prior to Patti becoming a suspect.

Applying the familiar rules to determine the credibility of witnesses and the reliability of their testimony, the Court determines that the arson was arranged by Tri Nguyen, who provided the purpose to burn down two pieces of paper, a purpose which would directly benefit Patti, who just happened to be his employer. Patti had learned of a criminal investigation into his tax evasion just

days before, and as the evidence clearly shows Whit Brown's files contained two damning pieces of paper, which were altered pay estimates corresponding to the exact $1,098,996.06 Corps of Engineers' payment to the Patti Shipyard that had, as Patti has now admitted, been diverted to Patti – by Patti to himself, which he failed to declare on the corporate income tax return or his own.

It cannot reasonably be ignored that Nguyen's pay from [10] the Patti Shipyard increased in the immediate years thereafter from approximately 32,000 per year in 1996, to $214,000 in 1998, the year of the attempted arson, and 274,000 the year following, with no noticeable increase in work performed according to Patti's own son and shipyard manager.

These facts lead to the undeniable conclusion, based upon everyday walking around reason and common sense, Patti solicited and conspired with Tri Nguyen, his long time trusted employee, to burn down Whit Brown's office to destroy two altered pay estimates which were damning to his criminal liability in the tax fraud case. This constitutes a dangerous attempt to obstruct justice.

As to the media campaign, the Court is well aware and respectful of the First Amendment guarantee of the freedom of speech and finds that it is permissible for an accused to deny his guilt wherever and as often as he may choose. However, that does not convey a right to attempt to intimidate and influence the decisions of the investigative agents, the prosecutors, grand jurors, the prospective jury pool or the judge. In this case Patti set out to do just that. He engaged in an extensive media campaign to discredit everyone connected with his case, without regard to the truth. In this regard, with the help of some in the

media, he drug everyone and anyone who stood in his way through the muck and the mud with scandalous accusations directed at all who sought to get to the [11] truth, which he intentionally set out to hide. Former accountants, tax agents, criminal investigators, the U.S. Attorney and his assistants, anyone who attempted to get at the truth was subjected to unwarranted attacks on their professional integrity as well as their personal lives and attributes.

He threatened to close Joe Patti's, a Pensacola landmark, if he was convicted to invoke sympathy and pressure the public, all potential jurors, to consider what he claimed would be the dire consequences of his conviction. All the while looking the public, each and every one, right in the eye, pointing his finger and proclaiming his innocence, all the while knowing that he was guilty of a massive sophisticated fraud against his fellow citizens and taxpayers amounting to millions of tax dollars.

Patti lied to the public, even his friends and family, misleading them into giving statements of support, writing letters, displaying "I support Frank Patti" bumper stickers and badges, and threatening those who stood for the truth. He knowingly used stolen IRS documents in this effort, willfully crashed into a stationary locomotive and feigned amnesia to garner sympathy and support. Judging from the letters to the editor in local newspapers and quotes from the public that are in record of this Court, it was obvious that he had succeeded and the trial had to be moved to a different venue. Otherwise [12] it would have been difficult or even impossible to select a fair and impartial jury. Jury selection would have taken days and the jury would then have had to be sequestered for a six month (sic) trial period.

The First Amendment gives no such right. This boldfaced and shameful attempt to influence the investigation, manipulate the attitude of the potential jury pool, and stand in the way of a speedy and fair trial constitutes an attempt to obstruct justice.

As to the lawsuit against Whit Brown, a lot of time what's [sic] spent debating whether Patti's former accountant, Whit Brown, knew or should have known about the false statements on Patti and Pensacola Shipyard's tax returns. In fact, Mr. Brown was at times unnecessarily attacked in an unprofessional and uncalled for manner, considering that Mr. Brown's intent or competence is largely irrelevant to these proceedings. The evidence established that this is not a case where sloppy bookkeeping could be explained away by careless error that should have been corrected by the accountant. Patti's conduct reveals an obvious attempt to conceal his fraudulent conduct from both his accountant and the IRS. Moreover, subsequent accountants, hired by Patti after the criminal investigation had begun and all eyes were keenly trained on catching any errors, also failed to uncover Patti's continuing tax fraud. The responsibility falls squarely at Mr. Patti's feet.

[13] Despite the largely needless debate, not enough facts were presented to this Court to determine whether Patti's lawsuit against Mr. Brown is frivolous. Therefore, the Court makes no determination about that lawsuit. This determination is left to the Court presiding over that civil claim.

As to stolen IRS documents, Patti was undisputably in possession of stolen IRS documents, which he reviewed despite knowing their nature. Contrary to Patti's investigator's grand jury testimony that Patti was befuddled and

unaware of the documents' content, Patti wrote notes in the margins of the documents that the defense thought important enough to redact before turning them over to the Government. Also Dr. Johnson, an examiner from Butner, noted that Patti made statements that revealed he had reviewed them and was aware of their content. Moreover, Patti destroyed any envelopes which may have helped uncover who was sending the documents. Although the evidence before the Court may not rise to the level of a guideline obstruction of justice, it is clearly indicative of obstructive conduct.

As to transfer of assets, the Court agrees with the defense that Patti's transfer of assets to his children should not be considered obstruction of justice. Clearly Patti is not insolvent and has the means to pay any amount of restitution, fine or costs as directed by the Court, notwithstanding the transfers.

[14] The question of sophisticated concealment. There is little question here. This case is most definitely out of the heartland of tax fraud cases. Both the methods of concealment, as well as the exceptional number of methods, established the sophistication. The use of the Mary Callaway attorney trust account in and of itself constitutes a sophisticated scheme, as does the use of cashier's checks to hide the final destination of some of the undeclared money. But the scheme also included double books, changed invoices, false loan accounts, charging expenses to wrong boats, altered pay estimates, phony rent payments, building boats off the books, mis-coding personal expenses as business expenses, claiming personal boat lifts as depreciable business assets, as well as many other methods to hide what would be taxable income. Yes, it was a sophisticated scheme, sophisticated enough to fool three

certified public accountants, two even hired by Patti himself to help shield him from criminal liability.

Again, Patti argues for the application of 1997 rather than the 1998 Sentencing Guidelines. The '98 amendment resolved a conflict amongst the circuits regarding whether the enhancement applied to the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Although the amendment stated that the enhancement should apply to the overall offense conduct, the Court finds that sophisticated enhancement is appropriate even [15] if only considering Patti's personal conduct.

As to the enhancement for being an organizer or leader, initially the Court finds that the two offenses to which Patti has pled are properly grouped as outlined in the presentence report. As instructed by the guidelines, any remedy in the name of fairness is better left when considering a downward departure.

The Court finds that Patti was the organizer, leader of the A&F Seafood scam and that the scam involved five or more participants and was otherwise extensive. Alice Guy, Carol Lyons, Thelma Alpert, and Thi Binh, and to a lessor degree Doan Binh, were each participants in the conspiracy to defraud the United States by failing to withhold FICA and federal income taxes. Each is criminally responsible for his or her conduct, which they knew to be criminal at the time, either as a co-conspirator or as an aider and abettor. Assuming that there were not five participants, the scheme was otherwise extensive in that it involved a significant amount of money and was ongoing for an extensive period of time.

As to acceptance of responsibility, to this date this Court has seen little evidence of acceptance of responsibility. Clearly this was not the case over the past year or two covering the investigation and prosecution of the case. Patti has resisted the truth at every step. The mentioned obstructions of justice, the feigned amnesia, misuse of stolen [16] IRS documents, the media campaign, the public denials of the truth, the manipulation of the media, the vicious attacks on all who stood against him, all the while knowing his guilt, are incompatible with acceptance.

His plea was at the last moment, after the Government was put to the cost of trial preparation, not once but twice. This is incompatible with acceptance. And to this moment this Court has not heard words acknowledging what is known to be true, as evidenced by this five day sentencing hearing where almost every fact was contested. He has not yet admitted to the public or anyone else that he intentionally and knowingly lied to the entire community and undermined the public's respect for the criminal justice system under which they live. Patti has yet to admit and accept responsibility for his actions.

As to any departures, the defense has suggested that the court should find that Patti has assisted the Government in the investigation and prosecution of others to the extent that a downward departure is warranted, even though the Government has not filed a 5K1 motion certifying his substantial assistance. This Court finds otherwise, noting that Patti did not immediately cooperate with authorities, but only after he had communicated with the perpetrator by altering his marquee as directed and secretively talking to him at an off-premises pay phone. Only after determining that the man was only [17] attempting to scam him and was not able to assist by fixing

the jury as he claimed did Patti go to law enforcement. This hardly seems to be the type of conduct warranting a downward departure.

As for Patti's remaining departure arguments, example age, hardship on employees, work history, community service, any arguable mitigation that might cause the Court to depart downward is vastly outweighed by Patti's multiple obstructive acts. Although the Court does not depart upward for the additional obstructive acts, they are certainly sufficient to cancel out any downward departure.

Specifically as to Patti's generous acts, the defense concedes that the guidelines discourage such considerations, but argue that Patti's generosity is so extraordinary that it reaches beyond the guidelines. Patti's generosity is certainly not extraordinary where it was funded with millions in tax fraud dollars.

As for good faith reliance on his accountant, the Court finds that simply not to be true. Patti withdrew over two million from Our Mother, Incorporated's Capital Construction Fund account knowing full well that although Our Mother, Incorporated was exempt from taxes as long as the funds were used to buy boats, the revenue obtained from selling the boats would have to be reported as income. Contrary to the defense's argument, the evidence revealed that Mary Callaway [18] did not merely label the funds as tax free, rather she expounded that the funds were only tax free if used to buy boats. Notwithstanding the clear distinction, Patti diverted the money directly to himself.

So for the purposes of the guidelines the Court finds that for Counts 1 through 12 the tax loss and restitution is $4,577,523. As to Counts 13 through 24 the amount is

$213,744 – $213,744.18. Therefore, Defendant Patti is responsible for a total tax loss of $4,791,267.18. And that results in a base offense level under the guidelines of 21.

Based upon the Court's findings Patti receives applicable enhancements, two points for obstruction, two points for sophisticated concealment and four points as an organizer and leader. However, out of fairness to Patti, because the guidelines provide that the offenses for which he was charged be grouped, resulting in a substantial increase in his sentence, the Court uses its discretion to depart downward two points. Therefore, the final total offense level is 27. This results in a guideline range of sentencing between 70 and 87 months. It changes the fine guideline range from 12,000 to 125,000.

Any questions about the Court's pronouncements? Anything that you may have missed?

MR. COMISKY: No, sir.

MR. DAVIES: No, sir.

[19] THE COURT: If you want to come forward, please, for sentence. All right, Mr. Comisky, as to sentence.

MR. COMISKY: Your Honor, based on the Court's findings I don't have anything additional to say. We have been over it. The Court has made its findings.

THE COURT: Mr. Patti, anything that you wish to say before sentence is imposed?

THE DEFENDANT: Well, I've heard all you had to say back there, and you say I hadn't, to your knowledge, apologized to the Court. I did apologize to the Court, to the

Government, to the people when I pled guilty. And again, if you don't think I did, I want to reestablish the fact that I apologize to anyone that I misled, including the Court, the prosecutors, and anyone else that feels like they have been misled by me, I apologize and I ask for mercy and kindness from the Court. And I feel that whatever you do today, give me today will come from the Lord through you and that's all I can ask for. And I beg you for your mercy.

THE COURT: Mr. Davies.

MR. DAVIES: Your Honor, two things. As I understand it, the Court has not specifically addressed the guideline fine. The Government's position is that Hunerlach is right on point on the fine. Regardless of the guideline range, Hunerlach says typically the fine should be twice the tax loss, which would be $9,500,000 here. Hunerlach departed from a [20] $75,000 fine up to $250,000 for six million dollars of loss, two times the total loss. So certainly here a departure from what the Court now has the guidelines range at of 125,000 up to 350,000 is more than justified. And I think the Hunerlach case is right on point and the Court should follow it.

As to where to sentence the defendant in the guidelines, Your Honor, I would point out to the Court, and this is one thing, an argument that's not in my papers and hasn't been made before, is that he has committed $4,790,000 in tax fraud. That's $2,200,000 above the guideline cut-off. The guideline cut-off, the range is two-and-a-half million to $5,000,000. So you're bumping right up against the guideline level. Every time I have a drug case, Your Honor, and the drug dealer is at the low end, the drug quantities, down at the bottom part, they say

give them the bottom of the guidelines, and I typically don't dispute that.

Here you've got the dollar figure right bumping up against the top end of the guidelines, so that's a factor the Government submits you should consider in determining where in the guideline range to consider him. The dollar figure is at the high end of the guidelines. You should sentence him at the high end of the guidelines. More importantly, of course, you don't just have the dollar figure here. You've got someone that drove into a trained [sic] and faked amnesia, nefariously tried to evade a trial, someone that engaged in the media campaign [21] that you found him responsible for, someone that dealt with the stolen documents in the way that may not amount to obstruction in and of itself, as the Court has found, but is obstructive, and someone that tried to burn down his accountant's office. When you put all that together with the facts that the tax dollar figure is right up against the next guideline level, this is a case where the high end of the guidelines should be applied.

And ultimately, Your Honor, to the extent they've argued that he's sorry and that should go into the mix, he has fought us tooth and nail for a week. The defendant has obstructed, bullied and lied for two years. The Court should base where in the guidelines to sentence the defendant based on the law, the facts, and the evidence. And this is a case, given the facts, that the high end of the guidelines is where the Court should sentence this defendant.

THE COURT: All right. Anything further, Mr. Comisky?

MR. COMISKY: Your Honor, as the Court knows, almost any sentence may be a death sentence for Mr. Patti. We ask the Court to exercise its discretion and give him the lowest possible sentence consistent with the guideline range as determined by the Court.

THE COURT: Before imposing sentence I do want to say specifically, because it always seems to be a point that is raised and was raised yesterday in the comments of certain [22] witnesses, that I do reject the notion that the Court bear the blame of what happens to Joe Patti's Seafood and the shipyard while you are in prison. What blame there is, is yours alone. The Court did not commit the crime. You did. You are the one that cheated on your income tax over multi-years, not just in hundreds of dollars or even thousands, but millions. You are the one who lied to the people, to your family, to your friends, to your workers, and to the community. You are the one who caused all the hurt and misery that has resulted from this case. You are responsible. And you cannot shift the blame, as you've attempted to do in the past. You must bear the consequences of your willful illegal acts. And what happens to Joe Patti's and the shipyard is of your making, not the Government's or the Court's. And I want to be sure that that is made clear.

I also was reminded of the words of the Honorable Judge Frank C. Damrell yesterday by Mr. Davies and I would like to quote some from that to make the point of what this crime is about. And he stated in sentencing someone for tax fraud that, "a person who has enjoyed life, a comfortable life, a life of great wealth compared to most of the people in this country, that refuses to take up the obligation of citizenship is completely reprehensible. We have a social compact in this country that is embodied in

our constitution. It allows us as citizens to live together under one government. And when you [23] fail to honor your obligations to your country, in a sense that you break that compact you have with all the other citizens in this country, particularly with those who have died to allow you to pursue the life that you pursue, and I find that to be the most difficult thing. Young people willing to sacrifice their lives that we can live in security and freedom and the only obligation for the most part that we are asked to provide for the honor to be citizens of this country is to pay some taxes to allow this government to continue on providing security and freedom for us. And to me the story is as simple as that, the failure to honor your obligation to this country."

And I do find the presentence report to be accurate as we have modified it here today. And pursuant to the Sentencing Reform Act of 1984 and all amendments it's the judgment of the Court that you be committed to the custody of the Federal Bureau of Prisons for a term of 36 months as to Count 8 and 43 months as to Count 13, with the terms to run consecutive one to the other. That's a total sentence of – well, you can do the math.

MR. COMISKY: 79.

THE COURT: 79. This sentence is within the applicable guideline range established, and is a statutorily – Section 5G1.2 of the guidelines makes it clear that if no count of conviction caries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary [24] to achieve that total punishment. I do find this sentence meets the goals of punishment and acts as a general and hopefully specific deterrent to anyone else who might consider similar criminal conduct.

Pursuant to Title 18 of the United States code, Section 3663A, you shall be required to make restitution as to Count 13 to the Internal Revenue Service in the amount of $213,744.18. This amount is to be paid within 30 days of the judgment in this case. This amount is owed jointly and severally with co-defendant Alice Guy, should she be sentenced accordingly.

I do find there is a present financial ability to pay a fine within the applicable guideline range. It is therefore ordered that you pay a fine in the amount of $125,000. This amount is to be paid within 30 days of the judgment in this case. And pursuant to Title 26 United States Code, Section 7206, you are required to pay the cost of prosecution in the amount of $48,460.59, which is due and payable within 30 days of the judgment in this case.

And upon release from imprisonment you'll be placed on a period of supervised release for a term of one year as to Count 8 and three years as to Count 13 with the terms to run concurrently one with the other. Supervision to be under the standard conditions adopted by the Court, with the following special conditions: As to Count 8, restitution is ordered in [25] the amount of $4,577,523. And, of course, that amount will be reduced by any payments that have already been made as a discretionary condition of your supervised release. Any unpaid balance of the restitution amount shall become a condition of the defendant's supervised release, to be paid at a rate of not less than $24,164 per month, to commence three months after release from imprisonment.

You'll be required to cooperate with the Internal Revenue Service in complying with your obligation to pay taxes.

Mandatory drug testing is suspended, based upon the determination that you pose a low risk of an substance abuse.

I would ask, Mr. Comisky, any objections to the ultimate findings of fact or conclusions of law relating to this judgment or sentence, other than those that we've already discussed?

MR. COMISKY: Not other than already as noted. Would the Court permit a voluntary surrender? We would ask that.

THE COURT: We'll deal with that. Any objections by the Government?

MR. HENSEL: Judge, it's the Government's position, based on the circumstances of the case, including the danger to the community based on the Court's finding –

THE COURT: I'm interested in whether you have any objections to the findings of fact or conclusions of law.

MR. HENSEL: No objections to the findings regarding [26] the sentence, no, sir.

THE COURT: I want to be sure, Mr. Patti, that you understand you have ten days in which to appeal this sentence. You have a right to be represented by an attorney on an appeal. If you cannot afford one, one would be appointed for that purpose upon your petition to the Court. An appeal could be taken without cost to you in those circumstances.

MR. HENSEL: Judge, the special monetary assessment, I don't believe it was imposed by the Court.

THE COURT: You're correct, I did fail to state that. There is a special monetary assessment of $100 on each count, for a total of $200, which is due and payable immediately. That is as required by statute.

MR. COMISKY: Yes, sir.

THE COURT: All right.

MR. HENSEL: Regarding voluntary surrender, Judge, we're opposed to it. The Court has made a finding that Mr. Patti was a principal to the bungled arson attempt, as you indicated. He was involved in the charade of the amnesia that he perpetrated on the Court. Regarding the – that's the support for danger to the community.

Regarding risk of flight, as Mr. Comisky has repeatedly argued to the court, the sentence imposed by this Court of six years and seven months incarceration, they've referred to as the equivalent of a death sentence, certainly a [27] life sentence at least in their eyes as they see it toward Mr. Patti. We think that's another reason that Mr. Patti would not be amendable to a voluntary surrender. Certainly the added factor, Judge, of the delay of these entire proceedings based on his personal acts we think justifies that the imposition of sentence begin today. And we would ask that that occur.

THE COURT: Mr. Comisky.

MR. COMISKY: Your Honor, Mr. Patti, of course, has appeared every time, every day, voluntary surrender at the Butner facility, voluntary came back down here. The Court knows the difficulty and additional hardship when a voluntary surrender is not permitted. Would ask the Court to exercise its discretion and permit that.

THE DEFENDANT: Your Honor, can I say something?

THE COURT: You need to seek the advice of your counsel first.

MR. COMISKY: Let me speak for him. Even to the last minute Mr. Patti is worried about his businesses and his employees. If the Court permitted a voluntary surrender he would have the opportunity in a week or so, until the designation was done, to complete a sea trial on a boat he has just now put in the water. That's what Mr. Patti wanted to express.

THE COURT: Well, I must say that it is a close question given the findings of the Court and the past actions. [28] However, you have abided by all conditions of release up to this point, so I'm going to allow you to remain at liberty under the same bond with the same terms and conditions applying.

THE DEFENDANT: Thank you.

THE COURT: With the added provision that you report to the United Sates Marshal by 12:00 noon on the 12th of August in this building. Or if a place of confinement has been designated you may report there voluntarily at your own expense by 12:00 noon on the 12th of August. You are advised that failure to report to either of these places as directed would constitute a violation of your release conditions, subject your bond to forfeiture and you to further prosecution for failure to abide by these conditions.

Do you have any questions about that?

THE DEFENDANT: No, sir. I thank you.

THE COURT: Then you need to see the probation officer before you leave here today.

MR. COMISKY: Thank you, Your Honor.

THE COURT: Court will be in recess.

(Proceedings concluded.)

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

No. 03-575

In the Supreme Court of the United States

FRANK M. PATTI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's unconditional plea of guilty waived his right to challenge on appeal the district court's denial of his motion to recuse the judge under 28 U.S.C. 455(a).

2. Whether a remand to the district court for resentencing was necessary under *Williams* v. *United States*, 503 U.S. 193 (1992), where the Eleventh Circuit found that an enhancement under Sentencing Guidelines § 3C1.1 for obstruction of justice was supported by two grounds on which the district court relied and the court of appeals determined that it was not necessary to address a third ground.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 337 F.3d 1317. The orders of the district court (Pet. App. 17-31) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-16) was entered on July 18, 2003. A petition for a writ of certiorari was filed on October 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of filing a false income tax return, in violation of 26 U.S.C. 7206(1), and one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 79 months of imprisonment and ordered to pay a $125,000

fine, $48,460.59 for costs of prosecution, and $4,791,267.18 in restitution. The court of appeals affirmed. Pet. App. 1-16.

1. Petitioner owned Patti Shipyard Inc. (Shipyard), a boat-building company. During 1996, petitioner diverted to himself $1,098,996 paid to the Shipyard by the Army Corps of Engineers for two boats, and petitioner thereafter willfully failed to report any of the diverted funds on his 1996 individual income tax return. 4/12/02 Plea Tr. 10-11, 15. During 1996, petitioner also diverted more than $3 million related to three other shrimp boats without reporting those amounts on his 1996 individual income tax return. Gov't C.A. Br. 8-9.

During the years 1994 through 1998, petitioner was the 95% owner of Joe Patti Seafood (Patti Seafood), a corporation that operated a large seafood store in Pensacola, Florida. Petitioner conspired with Alice Guy, who was petitioner's fiancée and the General Manager at Patti Seafood, to defraud the United States by impeding the Internal Revenue Service in the ascertainment and collection of federal income taxes and FICA taxes. Petitioner and Guy engaged in a scheme whereby they paid Patti Seafood employees in cash and willfully failed to collect and pay required federal income and FICA taxes. Gov't C.A. Br. 11-12; 4/12/02 Plea Tr. 13-14.

2. Following indictment, petitioner's case was assigned to United States District Judge Lacey A. Collier. Before the scheduled trial date, petitioner filed a motion under 28 U.S.C. 455(a) to disqualify the judge for an alleged appearance of partiality. Petitioner asserted that he was informed by a man who was friends with the judge that the man could get the charges dropped if petitioner donated a large sum of money to a charity with which the judge was associated. Petitioner

also argued that the judge knew the United States Attorney and that the judge supported his reappointment. Pet. App. 2 n.2.

The district court denied petitioner's motion. Pet. App. 17-28. The court observed that the alleged discussion of a contribution to a charity favored by the judge in exchange for getting the charges dropped occurred seven days before petitioner's arraignment and the assignment of the case to the judge. *Id.* at 25. The court noted "[i]t is hard for a reasonable observer to imagine such a serious discussion as alleged concerning the 'bribery' of a judge who at the time was not known to be the judge assigned to try the case." *Ibid.* The court also rejected petitioner's allegation that the judge's expression of support for the United States Attorney created an appearance of partiality. The court explained that "[t]he fully informed observer would know that judges are frequently called upon to express an opinion concerning the competence of persons being considered for positions within the justice system." *Id.* at 22. The court further observed that "this judge had been complimentary in support of [petitioner's then-lead counsel] in his application for a federal position." *Id.* at 23. The judge also stated that a claim of favoritism toward the United States Attorney was undercut by readily available records showing that the judge in many cases had ruled against the United States Attorney's office. *Ibid.*

Petitioner subsequently filed with the district court a letter in which Micki Conti, the caregiver for the district judge's mother, stated that the judge had discussed certain aspects of petitioner's case in front of her and others. Pet. App. 2. The district court entered a supplemental order dated May 21, 2001, reaffirming its earlier denial of petitioner's motion. *Id.* at 29-31. The

court concluded that no reasonable observer, fully informed of the facts, could question the court's impartiality based on Conti's letter. *Id.* at 31. The court observed that "[a]ll alleged comments * * * concerned allegations appearing in the news media and the public record of the case." *Id.* at 30. The court also explained that "[i]t is not claimed—nor can it be—that this judge ever uttered or even insinuated any opinion about [petitioner], the merits of his case, or his guilt or innocence. Interestingly enough, one of the statements alleged indicates that the judge's only concern was that [petitioner] receive a fair trial, which is, after all, the single most important duty and responsibility of a presiding judge." *Ibid.*

On April 12, 2002, petitioner entered into a plea agreement, in which he unconditionally agreed to plead guilty to two counts in return for the government's agreement to dismiss the remaining 22 counts of the superseding indictment and not to pursue any additional tax charges against petitioner for the tax years 1993 through 1998. At the guilty plea hearing, the district court informed petitioner of his right to a jury trial, his right to counsel, his absolute right to remain silent, his right to confront witnesses called against him and to call witnesses on his own behalf, and the right to require the government to prove him guilty beyond a reasonable doubt. After being informed of his trial rights by the district court, petitioner indicated that he understood that he was waiving those rights by pleading guilty. Petitioner also indicated that he understood that he was giving up the right to appeal the question of his guilt or innocence and could only appeal his sentence. 4/12/02 Plea Tr. 8-9. Petitioner did not renew his recusal motion after entering his guilty plea.

Following a five-day sentencing hearing, the district court determined that the government had established three grounds for applying the two-level enhancement under Sentencing Guidelines § 3C1.1 to petitioner's offense level for obstruction of justice. Pet. App. 36-40. First, the court found that petitioner obstructed justice by feigning amnesia to delay a trial in the case. *Id.* at 36-37. Second, the court found that petitioner was involved in an attempted arson at his accountant's office in order to destroy documents relevant to his tax fraud. *Id.* at 37-38. Third, the court concluded that a media campaign by petitioner constituted an attempt to obstruct justice. *Id.* at 38-39. The district court sentenced petitioner to a total of 79 months of imprisonment, the middle of the applicable Guidelines range. Pet. App. 43-45, 49-50.

3. The court of appeals affirmed. Pet. App. 1-16. The court concluded that petitioner's unconditional guilty plea waived his right to challenge the district court's denial of the motion for recusal under 28 U.S.C. 455(a). Pet. App. 4-9. The court of appeals also observed that petitioner did not attempt to challenge the denial of the recusal motion either by petitioning for a writ of mandamus or by seeking to enter a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). Pet. App. 8-9.

The court of appeals also rejected petitioner's challenge to the district court's sentencing enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1. Pet. App. 12-16. The court concluded that the enhancement was supported by petitioner's feigned amnesia and malingering that postponed the trial and forced the government to waste time and resources in evaluating petitioner's competency. *Id.* at 13-14. The court of appeals also concluded that there was sufficient

evidence to support the district court's finding that petitioner was involved in the attempted arson at his accountant's office. *Id.* 14-15. The court of appeals concluded that because two of the three grounds found by the district court "independently support the obstruction enhancement," the court "need not consider the propriety of enhancing a defendant's sentence based upon statements made to the media." *Id.* at 13 & n.13.

ARGUMENT

1. Petitioner contends (Pet. 10-18) that, despite his unconditional guilty plea, he is entitled to appeal the district court's denial of his recusal motion under 28 U.S.C. 455(a). That contention lacks merit, and the conflict of authority identified by petitioner does not warrant this Court's review. This Court has denied certiorari previously in a case involving this same issue. See *Shearer* v. *United States*, 528 U.S. 827 (1999). There are no new circumstances warranting a different result here.

An unconditional guilty plea generally waives all nonjurisdictional defenses to a prosecution. *United States* v. *Broce*, 488 U.S. 563, 569 (1989); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); see generally 1A Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 175, at 222 (3d ed. 1999). Relying on that well-settled principle, the Eleventh Circuit has joined the courts of appeals for the Fifth and Tenth Circuits in holding that a defendant who has pleaded guilty may not thereafter appeal a judge's earlier denial of a motion to recuse under 28 U.S.C. 455(a). Pet. App. 4-9; *United States* v. *Hoctel*, 154 F.3d 506, 507 (5th Cir. 1998); *United States* v. *Gipson*, 835 F.2d 1323, 1324-1325 (10th Cir. 1988). In contrast, the First and Second Circuits have held that the denial of a Section 455(a)

motion is appealable notwithstanding entry of a guilty plea *United States* v. *Brinkworth*, 68 F.3d 633, 638 (2d Cir. 1995); *United States* v. *Chantal*, 902 F.2d 1018, 1021 (1st Cir. 1990).

The conflict does not warrant this Court's resolution. The rule adopted by the court of appeals in this case does not create insuperable barriers to appellate review for persons in the same position as petitioner. All of the courts of appeals that have considered the appealability of a recusal decision—including those that do not permit an appeal of a denial of a Section 455(a) motion following an unconditional guilty plea—have held that a defendant may petition for mandamus to obtain review of a district court judge's refusal to recuse himself. See, *e.g.*, *United States* v. *Horton*, 98 F.3d 313, 316 (7th Cir. 1996); *Nichols* v. *Alley*, 71 F.3d 347, 350 (10th Cir. 1995); *In re School Asbestos Litig.*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990); *In re Faulkner*, 856 F.2d 716, 720-721 (5th Cir. 1988). That view has been described as the "consensus position" of the courts of appeals. *In re School Asbestos Litig.*, 977 F.2d at 775. The Seventh Circuit has held that a failure to seek a writ of mandamus following the district court's denial of a recusal motion waives the argument on appeal, *Horton*, 98 F.3d at 316-317. The court cited *United States* v. *Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986), in which it had explained:

> [W]e have held that a writ of mandamus is an appropriate remedy against a judge who refuses to recuse himself when required to do so under that statute [28 U.S.C. 455(a)]. The writ of mandamus is the vehicle by which we may exercise our supervisory powers over the district courts with respect

> to § 455(a). To require a timely petition for a writ of mandamus as the sole remedy serves another important purpose: that of *preventing* injury to the public perception of the judicial system before it has a chance to occur. If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. Prevention in such circumstances is clearly preferable to attempts to cure.

Id. at 1205 (citations omitted). Courts have granted petitions for a writ of mandamus when the circumstances have so warranted. See, *e.g.*, *Nichols*, 71 F.3d at 352; *In re Faulkner*, 856 F.2d at 720-721. Because litigants have an adequate remedy to challenge the denial of a recusal motion, whether or not a guilty plea constitutes a waiver, there is no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals.

Petitioner contends (Pet. 17-18), however, that an immediate petition for a writ of mandamus was not "viable" because the Eleventh Circuit and other courts of appeals have reviewed disqualification denials after entry of final judgment. But the cases on which he relies are inapposite, because they involved appeals from judgments of convictions following jury trials. *United States* v. *Arena*, 180 F.3d 380, 398-399 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000); *United States* v. *Jordan*, 49 F.3d 152, 155-158 (5th Cir. 1995); *United States* v. *Young*, 39 F.3d 1561, 1569-1570 (11th Cir. 1994); *United States* v. *Chandler*, 996 F.2d 1073, 1103-

1104 (11th Cir. 1993), cert. denied, 512 U.S. 1224 (1994). Petitioner cites no decision holding that a defendant is barred from seeking a writ of mandamus before entering a guilty plea and, as discussed, many decisions have held that recusal denials are reviewable by way of mandamus. Moreover, petitioner did not attempt to seek mandamus, despite filing four interlocutory appeals and a petition for a writ of mandamus on other issues before entering his guilty plea. Gov't C.A. Br. 4, n.2.

Petitioner also asserts that "the notion that [petitioner] could have preserved the disqualification issue by entering into a conditional plea under Fed. R. Crim. P. 11(a)(2) (which requires the approval of the district court and the consent of the government) is wholly unrealistic." Pet. 18. As the court of appeals pointed out, however, petitioner "did not attempt to exercise" that option. Pet. App. 8. Petitioner has no basis for suggesting (Pet. 18) that a conditional plea would necessarily have been rejected by the court and the government. Given that the inquiry under 28 U.S.C. 455(a) is whether there is an appearance of partiality, rather than actual bias on the part of a judge, there is no concrete reason to believe that a judge would routinely or willfully reject a conditional plea agreement seeking to preserve the appearance issue for appeal. Also unavailing is petitioner's assertion that the government insisted that he plead "'straight up' to enough counts to enable the district court to impose a guideline sentence." Pet. 18. Petitioner does not state that the government ever refused to consider any conditional plea.

Petitioner also argues that the rule that a guilty plea waives all non-jurisdictional challenges should not apply here because he did not seek to withdraw his guilty

plea, but "sought a sentencing before an impartial jurist." Pet. 17; accord *id.* at 18. After his plea and before sentencing, however, petitioner did not renew his motion to disqualify or file a petition for mandamus. Indeed, petitioner did not argue below that he was only seeking recusal for the purpose of sentencing (and not for withdrawal of the plea), and the court of appeals accordingly did not address the issue. Moreover, where the underlying legal issue has crystallized before a guilty plea, it has been held that a guilty plea waives issues that arise during sentencing. See *United States* v. *Arango*, 966 F.2d 64, 66 (2d Cir. 1992) (defendant's challenge to illegally seized evidence used in sentencing him waived by his plea of guilty).[1]

In any event, this Court's review is not warranted in this case, because the sentencing demonstrates that there is no basis for a belief that the judge was partial during sentencing. Petitioner was sentenced at the mid-point of the applicable Guidelines range, after the parties urged that petitioner be sentenced at the respective opposite ends of the range. Pet. App. 45-49. The district court, "out of fairness" to petitioner,

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[1] Petitioner also argues (Pet. 14-15) that the court of appeals erred in finding that petitioner's guilty plea was sufficient to constitute a waiver under 28 U.S.C. 455(e), which prevents acceptance of the parties' waiver of the grounds for disqualification under 28 U.S.C. 455(b), but permits acceptance of the parties' waiver of the grounds for disqualification under 28 U.S.C. 455(a) following "a full disclosure on the record of the basis for disqualification." The court of appeals in a footnote simply observed that the alleged grounds for disqualification were set forth both in petitioner's recusal motions and the district court's orders denying the motions. Pet. App. 7 n.6. The court of appeals made its observation in the context of its general conclusion that 28 U.S.C. 455(e) demonstrates that the right guaranteed by Section 455(a) is an individual right subject to waiver by a defendant. Pet. App. 6-8 & n.7.

granted petitioner a discretionary two-level downward departure in determining the applicable sentencing range, as the court concluded that the grouping of the two offenses to which petitioner had pleaded guilty would have resulted in a substantial increase in his sentence. *Id.* at 45. And the court of appeals held that petitioner was properly sentenced. *Id.* at 2 n.1, 9-16. Thus, it is unlikely that one viewing the proceedings would reasonably believe that the judge was biased against petitioner during sentencing.

2. Petitioner also contends (Pet. 19-23) that the court of appeals' ruling rejecting his challenge to the district court's sentencing enhancement for obstruction of justice conflicts with the rule announced in *Williams* v. *United States*, 503 U.S. 193, 201-205 (1992), that when a sentencing court departs on both valid and invalid grounds, a remand is required unless the reviewing court determines that the sentence was reasonable and the sentencing court would have imposed the same sentence absent reliance on the invalid grounds. That rule, which applies to *departures* or other decisions affecting the applicable Guidelines' sentencing range, is inapposite here. As explained in *Williams*, a "remand [for resentencing] is required only if the sentence was 'imposed *as a result of* an incorrect application' of the Guidelines." *Id.* at 202-203 (citing 18 U.S.C. 3742(f)(1)). "When a district court has not intended to depart from the Guidelines, a sentence is imposed 'as a result of' an incorrect application of the Guidelines when the error results in the district court *selecting a sentence from the wrong guideline range.*" *Id.* at 203 (emphasis added).

Petitioner accordingly errs in contending (Pet. 19-21) that the court of appeals should have remanded the case for resentencing after affirming only two of the

three grounds for the district court's obstruction of justice enhancement. Where an enhancement is based on a valid ground, any possible error in relying on other grounds has no impact on the defendant's sentencing range. Under Sentencing Guidelines § 3C1.1, the enhancement must be applied if the defendant engaged in any obstruction or attempted obstruction. The guideline states:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, *increase the offense level by 2 levels.*

Ibid. (emphasis added). That language is mandatory, not leaving application of the guideline to the discretion of the court once conduct constituting obstruction of justice is found. *United States* v. *Ancheta*, 38 F.3d 1114, 1118 (9th Cir. 1994); *United States* v. *Dunnigan*, 507 U.S. 87, 98 (1993). Thus, consideration of an invalid ground, along with a valid ground, in applying the obstruction enhancement does not result in the sentencing court's selecting a sentence from the incorrect Guidelines range and is not an incorrect application of the Guidelines. Accordingly, *Williams* did not require the court of appeals to remand for resentencing.

The court of appeals' decision does not conflict with any of the decisions that petitioner cites. Pet. 20, 21. In each of those cases, there was an error affecting the determination of the correct sentencing range. *United States* v. *Knight*, 266 F.3d 203, 206-210 (3d Cir. 2001) (error in criminal history score); *United States* v.

Thayer, 201 F.3d 214, 229-230 (3d Cir. 1999) (error in applying violation-of-judicial-process enhancement under Sentencing Guidelines § 2F1.1(b)(4)(B)), cert. denied, 530 U.S. 1244 (2000); *United States* v. *Kendrick*, 22 F.3d 1066, 1068-1070 (11th Cir. 1994) (error concerning an invalid basis for acceptance-of-responsibility adjustment); *United States* v. *Tello*, 9 F.3d 1119, 1131 (5th Cir. 1993) (error in failing to reduce defendant's offense level for additional acceptance of responsibility adjustment under Sentencing Guidelines § 3E1.1(b)); *United States* v. *Corley*, 978 F.2d 185, 186-87 (5th Cir. 1992) (error in criminal history score, resulting in decision to depart upward); *United States* v. *Rodriguez-Razo*, 962 F.2d 1418, 1423-1424 (9th Cir. 1992) (reversing obstruction-of-justice enhancement); *United States* v. *Willard*, 909 F.2d 780, 781-783 (4th Cir. 1990) (remanding for resentencing where district court failed to resolve dispute about Guidelines range or state that sentence would have been the same regardless of such resolution). By contrast, in this case, there was no error affecting the determination of petitioner's sentencing range. Regardless of whether petitioner's media campaign constituted obstruction under Section 3C1.1, application of the Guideline was required on the basis of either of the grounds approved by the court of appeals.

Petitioner also argues that "[w]ithout a finding on each of the 'multiple obstructive acts,' the district court may have granted the acceptance of responsibility adjustment, a downward departure, or at least sentenced [petitioner] at the low end of the guideline range." Pet. 20. The court of appeals specifically rejected, however, petitioner's challenges to the district court's denial of petitioner's request for a downward departure and a finding of acceptance of responsibility. Pet. App. 2 n.1 ("As we find that those issues lack merit and do not re-

quire any discussion, we will not address them herein.").[2] Moreover, given the seriousness of the bases that the court of appeals affirmed for the obstruction of justice enhancement, it is reasonable to conclude that the district court would have imposed the same sentence without regard to petitioner's media campaign.

Finally, petitioner asserts (Pet. 22) that the court of appeals clearly erred in finding that he was involved in the attempted arson at his accountant's office. That fact-bound issue does not warrant review by this Court. In any event, as discussed, petitioner's feigning of amnesia to prevent trial independently required the enhancement for obstruction of justice.

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[2] *Williams* would not require a remand for the district court to determine whether to resentence petitioner at the low end of the guideline range without regard to petitioner's media campaign. As discussed, *Williams* requires consideration of a remand only if the sentence was imposed as a result of an incorrect application of the Guidelines in a manner that affects the applicable sentencing range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003

(3)

No. 03-575

Supreme Court, U.S.
FILED
DEC 30 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANK M. PATTI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

In opposing certiorari, respondent acknowledges the profound circuit conflict on an issue at the core of our independent judiciary: whether an unconditional guilty plea waives the right to appeal a district court's denial of a recusal motion pursuant to 28 U.S.C. § 455(a). Br. in Opp. 6-7. Nonetheless, respondent contends that the acknowledged conflict "does not warrant this Court's review" because the extraordinary writ of mandamus purportedly suffices as an "adequate remedy," leaving "no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals." *Id.* at 6, 8. Respondent's arguments focus not on whether certiorari is warranted, but instead on why a criminal defendant's challenge to the impartiality of a jurist should not be reviewable at all. The undisputed circuit conflict on this issue is ripe for review and should be resolved by the Court now.

Further, respondent also defends the failure of the court of appeals to determine whether petitioner's sentence would have been the same in the absence of one of the three grounds for an obstruction of justice sentencing enhancement found by the district court by claiming it did not violate this Court's holding in *Williams v. United States*, 503 U.S. 193 (1992). Br. in Opp. 11-14. In doing so, respondent has either misconstrued or simply ignored petitioner's argument. The district court's finding of "multiple acts of obstruction" (Pet. App. 44a) was the linchpin of the entire sentencing decision, including the rejection of an adjustment for acceptance of responsibility and a downward departure on multiple grounds (*id.* at 43a-44a), which clearly affected the determination of petitioner's sentencing range. Pursuant to *Williams*, the court of appeals was required to determine whether petitioner's sentence would have been the same if based upon only two of the three obstruction grounds. Its failure to do so warrants review by this Court.

A. This Court Should Grant Certiorari To Resolve the Mature and Undisputed Circuit Conflict Over Whether An Unconditional Guilty Plea Waives the Right To Appellate Review of the Denial of a Recusal Motion Pursuant to 28 U.S.C. § 455(a)

1. Respondent does not contest the statistic that nearly 97 percent of criminal defendants plead guilty or that trial rates continue to decline. *See* United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2001), Table 10, Figure C. Nor does respondent dispute that the courts of appeals are in irreconcilable conflict over the question of whether an unconditional guilty plea waives the right to challenge on appeal a district court's denial of a recusal motion pursuant to 28 U.S.C. § 455(a). Br. in Opp. 6-7. Respondent fails to identify any legitimate reason why this is not an appropriate case by which to resolve the conflict definitively.

Instead, citing *Shearer v. United States*, 528 U.S. 827 (1999), respondent claims that this Court "has denied certiorari previously in a case involving this same issue" and that "[t]here are no new circumstances warranting a different result here." Br. in Opp. 6. The petition for writ of certiorari filed in *Shearer*, however, arose out of an unpublished opinion of the court of appeals. *See United States v. Shearer*, 167 F.3d 538 (5th Cir. 1998) (table). More important, in opposing certiorari, the government highlighted the fact that the petitioner had pleaded guilty and subsequently *did not challenge any aspects of the presentence report*. *See* Brief for the United States in Opposition in *Shearer v. United States* (No. 98-9096) at 3. The court of appeals' decision in *Shearer* did not warrant review by this Court in light of petitioner's failure to object to the presentence report.

In this case, by contrast, petitioner objected to numerous findings in the presentence report, and the sentencing proceedings were hotly contested. Pet. App. 32a-45a. On appeal, petitioner contended that, *inter alia*, the district court erred in (1) calculating the base offense level; (2) refusing to grant an adjustment for acceptance of responsibility; and (3) denying a downward departure on a number of grounds, including

cooperation with law enforcement authorities. Indeed, one of the challenged findings, holding that petitioner had obstructed justice by mounting a media campaign, independently warrants review here. *See* Part B, *infra*.

In addition, since this Court denied certiorari in *Shearer*, there had been two developments. First, the Eleventh Circuit in this case has weighed in on the division of opinion, thus enlarging the split among the circuits. Second, one of the cases involved in the conflict, *United States v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.), *cert. denied*, 486 U.S. 1044 (1988), has been called into question by a later decision (which respondent ignores) where the Tenth Circuit *permitted* review of a disqualification denial after the defendant entered into a plea agreement that was conditioned upon other issues. *See United States v. Greenspan*, 26 F.3d 1001, 1005-07 (10th Cir. 1994). These authorities also demonstrate that the question presented is one that frequently recurs in criminal cases.

Moreover, recent legislation, when coupled with Justice Department directives, makes it critically important to review this issue now. Requirements of the PROTECT Act purportedly seek to ensure fairness in the sentencing process for the government as well as the defendant. *See* PROTECT Act, Pub. L. 108-21, Tit. IV, § 401(d), (h), 117 Stat. 670-72 (Apr. 30, 2003). The Attorney General's memorandum to federal prosecutors entitled "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" (Sept. 22, 2003), recognizes that:

> *Just as the sentence a defendant receives should not depend on which particular judge presides over the case*, so too the charges the defendant faces should not depend on the particular prosecutor assigned to handle the cases (emphasis added).

It is simply incongruous for respondent to argue for a measure of fairness to the government, but to object to the critical means of fairness – the appearance of an impartial jurist – for the criminal defendant.

2. Respondent flatly misstates the record in maintaining that "petitioner did not argue below that he was only

seeking recusal for the purpose of sentencing (and not for withdrawal of the plea)." Br. in Opp. 10. To the contrary, petitioner made clear below that he was only seeking resentencing before a different judge. *See* Appellant's C.A. Br. 18; Appellant's C.A. Reply Br. 1. Thus, this Court's guilty plea jurisprudence does not support a finding that a plea waives the right to challenge a recusal motion. *See Brady v. United States*, 397 U.S. 742, 750 (1972); *McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794-99 (1970).[1]

3. Respondent's central argument is that "[t]he conflict does not warrant this Court's resolution" because "[t]he rule adopted by the court of appeals in this case does not create insuperable barriers to appellate review for persons in the same position as petitioner." Br. in Opp. at 7. Respondent contends that because criminal defendants have an "adequate remedy" to challenge the denial of a recusal motion – by seeking a writ of mandamus – "there is no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals." *Id.* at 8.

Respondent's argument both exhibits a fundamental misunderstanding of the nature of mandamus review and requires this Court to abandon its longstanding policy against piecemeal review of criminal cases. As this Court has noted, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Will v. United States*, 389 U.S. 90, 95 (1967). It has been a Congressional determination since the Judiciary Act of 1789 that, as a general rule, appellate review should be postponed until after final judgment. *Kerr v. United States District Court*,

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[1] Respondent also faults petitioner for failing to renew his motion to disqualify after his plea and before sentencing. Br. in Opp. 4, 10. Petitioner filed two motions for recusal prior to his plea, Pet. App. 17a-31a, and was not required to renew those motions – which would have been futile – after his plea. In any event, because the government failed to raise this point below, it has been waived and may not be relied upon in this Court. *Davis v. United States*, 495 U.S. 472, 488-89 (1990).

426 U.S. 394, 402-03 (1976). For the writ to issue, "petitioners must show that they lack adequate alternative means to obtain the relief they seek, . . . and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (citations omitted). "Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. at 403. Finally, mandamus is disfavored because, as this Court has recognized, its use "indisputably contributes to piecemeal appellate litigation." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). This Court has stated that the policy against piecemeal litigation is particularly acute in criminal cases. *Will v. United States*, 389 U.S. at 96 (vacating writ granted in favor of government in criminal case). Indeed, in *Will*, in the context of a government appeal, this Court stated that it had never approved of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. *Id.* at 98.

Recognizing that mandamus is an extraordinary remedy, especially in the criminal context, the courts of appeals have held that "[t]he question of disqualification is reviewable on a petition for writ of mandamus, but a writ will not lie in the absence of exceptional circumstances." *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *accord In re School Asbestos Litigation*, 977 F.2d 764, 778 n.14 (3d Cir. 1992); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1028 (D.C Cir. 1976). The courts of appeals require a much greater showing for issuance of the writ prior to final judgment (a "clear and indisputable right" to the writ) than they require for reversal upon post-judgment review of the recusal decision (normally abuse of discretion). *See Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (recognizing differing standards of review).

These authorities make clear that mandamus is not intended to be an ordinary remedy in cases where a district court judge improperly refuses to recuse him/herself. While there are exceptional cases where appellate courts have

reviewed a pre-trial order denying a recusal motion, *Nichols v. Alley*, 71 F.3d at 352 (granting writ in case involving Oklahoma City bombing), mandamus has been denied in what would be perceived as other exceptional cases based upon this Court's drastic limitation on use of the writ. *See United States v. Moussaoui*, 333 F.3d 509, 516-17 (4th Cir. 2003) (denying writ in case involving order to produce enemy combatant witness for deposition). Respondent's contention – that mandamus is an adequate alternative remedy – is simply in error. Thus, if mandamus is to be the only available remedy, it should be by way of a clear pronouncement by this Court.

Moreover, respondent's argument merely highlights subsidiary circuit conflicts over the question of whether the failure to seek an immediate writ of mandamus waives the right to challenge a denial of recusal on appeal. Respondent points out that in the Seventh Circuit, "a failure to seek a writ of mandamus following the district court's denial of a recusal motion waives the argument on appeal." Br. in Opp. 7-8 (*citing United States v. Horton*, 98 F.3d 313, 316-17 (7th Cir. 1996) and *United States v. Balistrieri*, 779 F.2d 1191, 1205 (1985), *cert. denied*, 475 U.S. 1095 (1986)). Respondent fails to mention, however, that the Seventh Circuit is the *only* circuit holding that mandamus is the sole remedy for the denial of a recusal motion. In every other circuit, including the Eleventh Circuit, such a denial is reviewable on appeal following final judgment. *See, e.g., United States v. Morrison*, 153 F.3d 34, 47-49 (2d Cir. 1998); *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 384-85 & n.5 (11th Cir. 1991); *United States v. Barry*, 938 F.2d 1327, 1339-42 (D.C. Cir. 1991).

A second subsidiary circuit conflict arises out of the Third Circuit's opinion in *In re School Asbestos Litigation*, cited by respondent. There, the court of appeals held that the writ of mandamus will not lie to review an order denying recusal pursuant to 28 U.S.C. § 144 where a personal bias or prejudice is shown. 977 F.2d at 774-76; *see also SCA Services v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (same). No valid reason exists to preclude mandamus review in actual bias cases yet require it where only the appearance of partiality is alleged.

As demonstrated by petitioner, and conceded by respondent, the circuits are sharply divided on the preclusive effect of an unconditional guilty plea on the ability to challenge on appeal the denial of a recusal motion. Respondent's assumption that because mandamus is allegedly an "adequate remedy," it is *the* exclusive remedy, is a position supported by the case law of only one circuit. Moreover, as shown above, the extraordinary writ of mandamus cannot be considered an "adequate remedy" to contest recusal in a criminal case.

4. Respondent also faults petitioner for failing to preserve the recusal issue by seeking to enter into a conditional guilty plea under Fed. R. Crim. P. 11(a)(2). Use of that Rule requires the approval of the district court and the consent of the government. Opp. Br. at 9. Respondent claims that "there is no concrete reason to believe that a judge would routinely or willfully reject a conditional plea agreement seeking to preserve the appearance issue for appeal." *Id.* The First Circuit specifically rejected this illogical argument in *United States v. Chantal*, stating:

> Congress established by the detailed provisions of § 455(a) an entirely new concept of acceptable judicial disqualification. It would be incongruous to hold that for one seeking the benefit of such protection the consent would have to be obtained from the very judge whose qualifications are under attack.

902 F.2d at 1021.

Respondent also argues that the petitioner "has no basis for suggesting . . . that a conditional plea would necessarily have been rejected by the court and the government." Opp. Br. at 9. To the contrary, the record clearly demonstrates that the government objected to virtually every defense application and motion made below. The district court also denied petitioner's recusal motions on every occasion. Pet. App. 17a-31a. During oral argument before the court of appeals, the lead prosecutor flatly stated that he would not have consented to a conditional plea.

Moreover, respondent's argument places a defendant in a position where the issue may never be preserved. If petitioner had sought to enter a conditional plea, and had

his request been denied by either the government or the district court (as was highly likely), respondent would now have contended that an explicit waiver of the right to raise the recusal issue would have occurred. But the failure to seek a conditional plea, according to respondent, also results in a waiver. Under respondent's view, the defendant is left only with the option of proceeding to trial and foregoing the benefit of a sentencing adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Such a strange outcome clearly conflicts with this Court's recognition that "[t]he very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 865.[2]

5. Finally, respondent argues that review by this Court is not warranted "because the sentencing demonstrates that there is no basis for a belief that the judge was partial during sentencing." Opp. Br. at 10. Respondent's argument fundamentally misconstrues the applicable standard under § 455(a). To determine whether recusal is required, courts must assess "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), and not whether the proceedings had an appearance of fairness *in hindsight*.

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[2] Respondent also argues that the court of appeals was correct in its interpretation of the recusal statute's waiver provision, 28 U.S.C. § 455(e). Br. in Opp. 10 n.1. The court of appeals held that a recusal motion presented a "full disclosure on the record of the basis for disqualification." Pet. App. 7a n.6 (*quoting* 28 U.S.C. § 455(e)). That holding is not central to the grant of the petition and, in any event, the court of appeals erred in holding that the filing of a motion for recusal could constitute the full disclosure required by the statute. The statute was drafted so as to permit waiver by the parties after a full disclosure by the court not waiver by way of a denied motion to recuse. *See Code of Conduct for United States Judges*, "Notice Concerning Waiver of Judicial Disqualification."

Petitioner argued below for an adjustment based upon acceptance of responsibility and a downward departure on a number of grounds, including substantial assistance to law enforcement authorities (Pet. App. 43a-44a), all of which were denied by the district court. *Id.* The district court also imposed adjustments for multiple acts of obstruction of justice, sophisticated concealment, and role in the offense. *Id.* at 35a-42a. On this record, there is no reasonable basis to conclude, in hindsight, that petitioner received a fair sentence from a neutral and detached jurist.

B. The Eleventh Circuit's Ruling Upholding Petitioner's Sentence Based Upon Multiple Acts of Obstruction of Justice Ignored This Court's Decision in *Williams v. United States*

Respondent claims that this Court's decision in *Williams v. United States*, 503 U.S. 193 (1992), is inapposite here because the rule announced in that decision "applies to departures or other decisions affecting the applicable Guidelines' sentencing range." Br. in Opp. 11. While acknowledging *Williams* applies to "other decisions," respondent then argues that *Williams* is limited to guideline departures. As pointed out in the petition for writ of certiorari, the rationale of *Williams* has not been so limited; rather, it has been held by the courts of appeals to be equally applicable to adjustments affecting the Guidelines calculation. *See, e.g., United States v. Kendrick*, 22 F.3d 1066, 1068-70 (11th Cir. 1994).

Respondent further errs in contending that "there was no error affecting the determination of petitioner's sentencing range" because "[r]egardless of whether petitioner's media campaign constituted obstruction under Section 3C1.1, application of the Guideline was required on the basis of either of the grounds approved by the court of appeals." Br. in Opp. 13. The district court's finding of multiple acts of obstruction of justice was the linchpin of the district court's entire sentencing determination and all of its sentencing findings. Pet. App. 36a-45a. Without a finding on *each* of the "multiple obstructive acts," *id.* at 44a, the district court may well have reduced petitioner's sentence.

In similar circumstances, appellate courts in other circuits, have remanded for resentencing. For example, in *United States v. Vargas*, 230 F.3d 328 (7th Cir. 2000), the defendant contended that the district court refused to depart based upon the assessment of an invalid criminal history point. The Seventh Circuit remanded, holding that the error may have affected the district court's refusal to depart. *Id.* at 331. Here, similarly, the error resulted in the district court's refusal to grant an adjustment for acceptance of responsibility, to depart downward, or to sentence petitioner at the low end of the Guidelines range. The sentence imposed was, therefore, based upon an erroneous application of the Guidelines, 18 U.S.C. § 3742(f)(1), and remand was required.

Finally, respondent now claims that the same sentence would have been imposed after failing to advance that argument in the appellate court. Again, respondent has waived its right to do so. *Davis v. United States*, 495 U.S. at 488-89. Even if this argument has not been waived, the district court provided no indication that the same sentence would have been imposed absent the third obstructive act, and it is disingenuous for respondent to suggest that "it is reasonable to conclude that the district court would have imposed the same sentence." Br. in Opp. 14. This Court's decision in *Williams* compels that the court of appeals reach *all* issues underlying the obstruction enhancement which the district court determined were critical to all its sentencing decisions. This Court should grant certiorari and mandate a resentencing on all portions of the sentence affected by the court of appeals' failure to reach all of the obstruction of justice findings.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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